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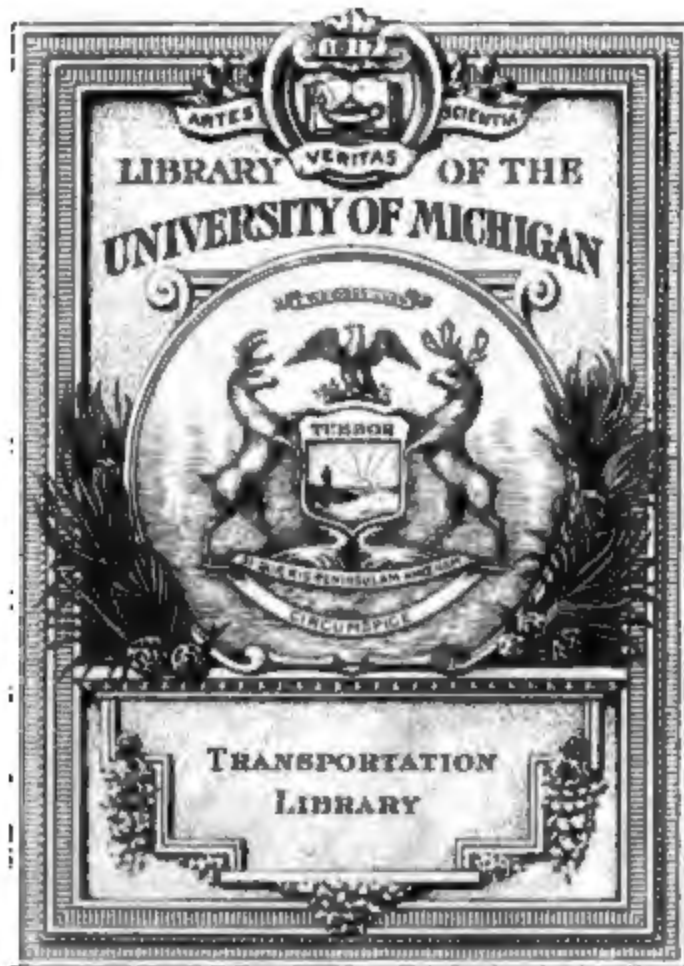
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INTERSTATE COMMERCE COMMISSION REPORT

VOLUME I.

REPORTS AND DECISIONS

OF THE

INTERSTATE COMMERCE COMMISSION

OF THE

UNITED STATES.

April 5th 1887 to April 5th 1888.

—
REPORTED BY THE COMMISSION.
—



NEW YORK:

**L. K. STROUSE & CO., LAW PUBLISHERS,
1888.**

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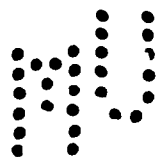


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THE INTERSTATE COMMERCE COMMISSION.

HON. THOMAS M. COOLEY, of Michigan, *Chairman.*

HON. WILLIAM R. MORRISON, of Illinois.

HON. AUGUSTUS SCHOONMAKER, of New York.

HON. ALDACE F. WALKER, of Vermont.

HON. WALTER L. BRAGG, of Alabama.

D E C I S I O N S
OF THE
INTERSTATE COMMERCE COMMISSION.

RULES OF PRACTICE IN CASES AND PROCEEDINGS BEFORE THE COMMISSION.

PUBLIC SESSIONS.

I. When at Washington the Commission will hold its general sessions at 11 o'clock A. M. daily, except Saturdays and Sundays, for the reception and hearing of petitions and complaints, and the transaction of such other business as may be brought before it. The sessions will be held at the office of the Commission in the Sun Building, No. 1315 F street, northwest. When special sessions are held at other places such regulations as may be necessary will be made by the Commission.

PETITIONS UNDER SECTION 4.

II. Applications under the fourth section of the act for authority to charge less for longer than for shorter distances for the transportation of passengers or property, must be made by petition addressed to the Commission by the carrier or carriers desiring the relief. The petition must state with particularity the extent of the relief desired and the points at and between which authority is asked to charge less for longer distances; the reasons for the relief sought must also be set forth, and the facts upon which the application is

founded. The petition must be verified by some officer or agent of the carrier in whose behalf it is presented, to the effect that the allegations of the petition are true to the knowledge or belief of the affiant. Notice must be published by a petitioner in not less than two newspapers along the line of the road having general circulation, for at least ten days prior to the presentation of a petition, stating briefly the nature of the relief intended to be applied for and the time when the application will be presented, and proof of each publication must be filed with the petition.

III. Upon the presentation of a petition for relief an investigation will be made by the Commission at a time and place to be designated, when testimony will be received for and against the prayer of the petition. After investigation the Commission will make such order as may appear to be just and appropriate upon the facts and circumstances of the case.

COMPLAINTS UNDER SECTION 13.

IV. Complaints under section 13 of the act of anything done or omitted to be done by any common carrier subject to the provisions of the act, in contravention of the provisions thereof, must be made by petition, which must briefly state the facts which are claimed to constitute a violation of the act, and must be verified by the petitioner, or by some officer or agent of the corporation, society or other body or organization making the complaint, to the effect that the allegations of the petition are true to the knowledge or belief of the affiant.

The complainant must furnish as many written or printed copies of the complaint or petition as there may be parties complained against to be served. When a complaint is made the name of the carrier complained against must be set forth in full, and the address of the petitioner, and the name and address of his attorney or counsel, if any, must be indorsed upon the complaint.

The Commission will cause a copy of the complaint to be served upon each common carrier complained against, by mail or personally, in its discretion, with notice to the carrier or

carriers to satisfy the complaint or to answer the same in writing within the time specified.

ANSWERS.

V. A carrier complained against must answer the complaint made within twenty days from the date of the notice, unless the Commission shall in particular cases prescribe a shorter time for the answer to be served, and in such cases the answer must be made within the time prescribed. The original answer must be filed with the Commission, at its office in Washington, and a copy thereof must at the same time be served upon the complainant by the party answering, personally or by mail. The answer must admit or deny the material allegations of fact contained in the complaint, and may set forth any additional facts claimed to be material to the issue. The answer must be verified in the same manner as the complaint. If a carrier complained against shall make satisfaction before answering, a written acknowledgment of satisfaction must be filed with the Commission, and in that case the fact of satisfaction without other matter may be set forth in the answer filed and served on the complainant. If satisfaction be made after the filing and service of an answer, a supplemental answer setting forth the fact of satisfaction may be filed and served.

VI. If a carrier complained against shall deem the complaint insufficient to show a breach of legal duty, it may, instead of filing an answer, serve on the complainant notice for a hearing of the case on the complaint, and in case of the service of such notice, the facts stated in the complaint will be taken as admitted. The filing of an answer will not be deemed an admission of the sufficiency of the complaint, but a motion to dismiss for insufficiency may be made at the hearing.

ADJOURNMENTS AND EXTENSIONS OF TIME.

VII. Adjournments and extensions of time may be granted upon the application of parties in the discretion of the Commission.

HEARINGS.

VIII. Upon issue being joined by the service of answer, the Commission, upon request of either party, will assign a time and place for hearing the same, which will be at its office in Washington unless otherwise ordered. Witnesses will be examined orally before the Commission except in cases when special orders are made for the taking of testimony otherwise. The petitioner or complainant must in all cases prove the existence of the facts alleged to constitute a violation of the act, unless the carrier complained of shall admit the same, or shall fail to answer the complaint. Facts alleged in the answer-must also be proved by the carrier, unless admitted by the petitioner on the hearing.

In cases of failure to answer, the Commission will take such proof of the charge as may be deemed reasonable and proper, and make such order thereon as the circumstances of the case appear to require.

WITNESSES AND DEPOSITIONS.

IX. Subpœnas requiring the attendance of witnesses will be issued by any member of the Commission in all cases and proceedings before it, and witnesses will be required to obey the subpœnas served upon them requiring their attendance or the production of any books, papers, tariffs, contracts, agreements, or documents relating to any matter under investigation or pending before the Commission.

Upon application to the Commission authority may be given, in the discretion of the Commission, to any party to take the deposition of any witnesses who may be shown, for some sufficient reason, to be unable to attend in person.

[Amendment June 15, 1887.]

Where a cause is at issue on petition and answer, each party may proceed at once to take depositions of witnesses in the manner provided by sections 863 and 864 of the Revised Statutes of the United States, and transmit them to the Secretary of the Commission without making any application to, or obtaining any authority from the Commission for that purpose.

AMENDMENTS.

X. Upon application by any petitionery or party amendments may be allowed by the Commission, in its discretion, to any petition, answer, or other pleading in any proceeding before the Commission.

COPIES.

XI. Copies of any petition, complaint, or answer, in any matter or proceeding before the Commission, or of any order, decision, or opinion by the Commission, will be furnished upon application by any person or carrier desiring the same, upon payment of the expense thereof.

AFFIDAVITS.

XII. Affidavits to a petition, complaint, or answer may be taken before any officer of the United States, or of any State or Territory, authorized to administer oaths.

PUBLICATION OF JOINT TARIFFS.

At a meeting of the Interstate Commerce Commission, held at the office of the Commission in the city of Washington on the 21st day of June, 1887 :

PRESENT, ALL THE COMMISSIONERS :

The subject of the publication of joint tariffs being under consideration, the following preamble and order were unanimously adopted and directed to be sent to all railroad companies subject to the "Act to Regulate Commerce :"

WHEREAS, Section six of the "Act to Regulate Commerce" authorizes the Commission to direct when joint tariffs shall be made public, and to prescribe the measure of publicity to be given to the same :

It is ordered, as follows :

Joint tariffs of rates, fares, or charges, established by two or more common carriers for the transportation of passengers or freight passing over continuous lines or routes, copies of which are required by the sixth section of the "Act to Regulate Commerce" to be filed with the Commission, shall be

made public so far as the same relate to business between points which are connected by the line of any single common carrier required by the first paragraph of said section to make public schedules of its rates, fares and charges. Such joint tariffs shall be so published by plainly printing the same in large type of at least the size of ordinary "pica," copies of which shall be kept for the use of the public in such places and in such form that they can be conveniently inspected, at every depot or station upon the line of the carriers uniting in such joint tariff where any business is transacted in competition with the business of a carrier whose schedules are required by law to be made public as aforesaid.

IN THE MATTER OF THE SOUTHERN PACIFIC RAILROAD COMPANY.

The Commission will not make an order for relief under the fourth Section of the Act to Regulate Commerce except upon verified petition and after investigation into the facts.

The following correspondence by telegraph presents clearly the point considered and decided :

SAN FRANCISCO, April 4, 1887.

To Judge T. M. Cooley, Chairman.

The question is before us, in competition with the Suez Canal route for business with China and Japan, whether we can make competing prices through to Atlantic ports at less rates than local rates charged, say from San Francisco to New York; the line from China and Japan being a continuous one in connection with the Central Pacific and Union Pacific Railways.

The question is also before us of making, in competition with Cape Horn and the Isthmus of Panama, a railroad rate that permits shipments between San Francisco and Atlantic ports, those rates (in order to meet competition) being necessarily lower for a longer distance than those charged for a shorter, and far below what would be a reasonable rate for the service performed.

We construe the fourth section of the Interstate Commerce

Act practically to be in substance the application to interstate commerce of the common law principle that the shipper avail himself of competition, and that a less rate may be charged for a longer than a shorter distance, providing more could not be obtained. If the right of competition is recognized as between the carrier and the shipper, our carrying business will not be interrupted; but otherwise we shall be unable to compete for the Chinese and Japanese trade with the Suez Canal, and also unable to compete with the water routes by Panama and Cape Horn for business originating in California. We await your construction.

LELAND STANFORD,
President Southern Pacific Railroad.

WASHINGTON, D. C., April 5.

Leland Stanford, San Francisco.

Applications to the Commission for special exception under the Interstate Commerce Law can only be granted after investigation into the facts. A verified petition, setting forth the grounds of application should be presented.

T. M. COOLEY, Chairman.

SAN FRANCISCO, April 6.

Judge T. M. Cooley, Chairman, Washington, D. C.

We do not ask for a ruling upon a special case, but a construction of section 4, as all the business between Pacific & Atlantic ports is governed by competition; the business from ports of China and Japan across the continent to Atlantic ports is governed by competition; and agents in China and Japan, to obtain business, make rates to meet the competition of Suez.

One of the Oriental & Occidental Company's ships will arrive in a few days with a cargo mostly for points east of the Rocky Mountains. If the rates established by the other companies are maintained, the contracts made for shipment cannot be carried out. All the through business of the overland lines is involved, and we cannot accept and dispatch freight, except upon a general ruling applicable to all business. The question arises upon every ton of freight offered for shipment and practically we find ourselves unable to do through

business. You will see, therefore, that a special ruling or exception will not meet the case, as it arises upon every ton of freight offered.

LELAND STANFORD.

WASHINGTON, April 7.

Leland Stanford, San Francisco.

The Commission were under no misapprehension regarding the facts ; but they still hold that if, rather than take the responsibility of your own construction, you call for authoritative action, a case must be formally presented by petition, and then investigated by them.

T. M. COOLEY, Chairman.

IN THE MATTER OF THE PETITION OF THE ORDER OF RAILWAY CONDUCTORS.

IN THE MATTER OF THE PETITION OF THE TRAD- ERS' AND TRAVELERS' UNION.

April 16, 1887.

The Commission will not express opinions on abstract questions, nor on questions presented by *ex parte* statements of fact, nor on questions of construction of the statute presented for its advice but without any controversy pending before it on complaint of violation of law.

Where the question on which advice is sought is whether carriers subject to the act may now grant any particular right or privilege which they were accustomed to grant before, the carriers should, in the first instance, determine it for themselves, and if it is then complained that what they do violates the Act, the question can be brought before the Commission on complaint, and it will then have jurisdiction to decide it.

OPINION OF THE COMMISSION.

WALKER, *Commissioner*.

An application in writing has been made to the Commission for its answer to the following questions, propounded on behalf of the Order of Railway Conductors:—1. Are railway companies prohibited from issuing free transportation to the immediate families of employes of their own railways? 2. Are railway companies prohibited from issuing free or reduced transportation to officers of associations composed exclusively of railway employes while those officers are temporarily out of railway service and exclusively employed by those associations? 3. May railway companies

issue passes to employes of other railways on the application of the employes, or must such application come from the officer of the company by which he is employed? 4. May railway companies issue free or reduced transportation to those who make railway service their business or trade while temporarily out of employment and in search of situations? 5. May railway companies provide free transportation for delegates to the annual conventions of an association composed exclusively of railway employes upon certificates from the officers of the association that they are such representatives? 6. If free transportation may be furnished to representatives described in question 5, must all such representatives be actually in the employ of such railway, or may it include those who may be temporarily out of employment, and those temporarily engaged in other employments as officers of such association? 7. If free transportation is provided for delegates described in question 5, may it include members of the immediate families of delegates? 8. If free transportation or reduced rates are provided for the representatives of any one association, must the same be extended to all others which are composed exclusively of railway employes on application?

Another application has been made to the Commission on behalf of the Traders' and Travelers' Union, stating the system under which an additional allowance of free baggage has been heretofore carried by commercial travelers, subject to written agreement for registry and indemnification, which system the Commission is requested to examine carefully, "and advise us if there is any reason why a railway company, desiring to do so, should not enter into such an arrangement to grant, under stated terms, an increased allowance of free baggage."

These two petitions, presented by highly respectable organizations and raising questions of immediate practical importance, are representatives of a large number of similar applications which have been made to the Commission for its construction of provisions of the "Act to regulate commerce" as applied to the various points at which those provisions touch the customs of the past. They have been selected sim-

ply because they indicate the general character of all, and enable the Commission to announce certain conclusions to which it has arrived respecting its jurisdictions and powers.

It is obvious, from the tenor of such applications as these, which reach us by every mail, that the impression is generally prevalent that this Commission has power to construe, interpret, and apply the law, by preliminary judgment. We are continually appealed to for decisions in advance as to whether common carriers, said to be willing to adopt certain methods of dealing with respect to Interstate Commerce, can do so without subjecting themselves to the penalties denounced by the statute for violation of its provisions.

A careful reading of the "Act to regulate commerce," under which this Commission is organized, will show to the petitioners and others who have made similar applications that no jurisdiction has been given us to answer these questions like those under consideration. An expression of our opinion upon these subjects at this time, being neither a duty imposed nor a power conferred by the statute, would carry with it no judicial efficacy or sanction ; in fact, would be no more useful to the public or the carriers than the opinion of other men upon the same points.

Two sections of the law confer power upon the Commission to entertain and decide applications and petitions.

Section 4 empowers us, upon application by a common carrier, to authorize such common carrier in special cases to charge less for longer than for shorter distances over the same line, and also to prescribe the extent of relief from the operation of the former part of the same section which a designated common carrier may from time to time enjoy. A number of petitions have been filed under this section, the consideration of which is at the present time engaging the attention of the Commission, and nothing said in this opinion is to be treated as in any manner bearing thereon. It is obvious that applications like those of the Railway Conductors and the Traders' and Travelers' Union have no relation whatever to the duties imposed upon us by section 4. And this is the only section of the law which the Commission has power to relieve against or relax.

Section 13 authorizes complaints to the Commission, and confers jurisdiction to entertain the same. It provides that any person, etc., "complaining of anything done or omitted to be done by any common carrier subject to the provisions of this act *in contravention of the provisions thereof*, may apply to said Commission by petition, which shall briefly state the facts." Notice and opportunity for answer having been given, unless satisfaction is made, an investigation is required. Upon such an investigation the Commission will necessarily entertain the consideration of the question whether the conduct complained of is or is not in contravention of the provisions of the law, and if it so adjudge, it is authorized to issue a notice enjoining the carrier from further violation of the law, and to award reparation for the injury done, or both. But neither the Railway Conductors nor 'Traders' and Travelers' Union complain that any common carrier has violated the law. On the contrary, they both aver that the railroad companies do not now violate the law, and do not wish to do so. The Conductors say that they fear they will not receive free passes as heretofore, and the 'Traders' and Travelers' Union say that they fear commercial travelers will not be allowed free transportation for 150 pounds of extra baggage, as was allowed last year. They present no complaint of anything done or omitted in contravention of the provisions of the law. If a railroad company should issue a pass to a conductor and his family to attend the approaching convention, or should transport 300 pounds of baggage free for a commercial traveler under the registry and indemnity system, and some person, feeling aggrieved, should make complaint of unjust discrimination, it would then be proper for the Commission to entertain the question of whether such conduct was or was not in violation of the law, and if so, whether it was or was not within the exceptions stated in section 22. Complaints may also be presented if the charges made by the carriers are not considered reasonable and just. But until questions of this kind come before us in the way clearly indicated by the statute, it would be worse than useless for us to express opinions or give advice.

We should not only lay ourselves justly open to the charge

of assuming unwarranted authority, but should also run great risk of involving all concerned in what the courts might afterwards hold to be breaches of the law, by hasty and ill-considered conclusions, based upon *ex parte* statements and arguments. Although it might be desirable, or at least convenient in respect to any piece of new legislation, to have a tribunal established to which inquirers might apply for instruction and advice respecting the meaning of the law and its application to suggested "circumstances and conditions," a moment's reflection will show that no such tribunal could be properly erected. Congress has not taken the management of the railroads out of the hands of the railroad companies. It has simply established certain general principles under which interstate commerce must be conducted.

It has enacted in section 1 that all charges for interstate transportation shall be reasonable and just; has prohibited in section 2 all manner of unjust discriminations; has forbidden in section 3 all undue and unreasonable preferences; has required in the same section reasonable and equal facilities for the interchange of traffic; and has prohibited in section 5 the pooling of freights. That, in substance, is the interstate commerce law. There is nothing novel in these provisions. They simply bring back the business of the common carriers to the well-settled principles of the common law. Yet no one can deny that there was urgent need of their statutory formulation. Alleged difficulties in putting them in operation only disclose examples of the extent to which they have been violated in the past.

These sections of the act are expressed in plain words. A construction must be given to them in the first instance by the carriers and their patrons. When a course of conduct has been adopted of which complaint is made that it violates the law, the decision of the question will rest with the courts or with the Commission, as the complaining party may elect. This is the orderly method in which all legislation is administered and applied, and the statute in question presents no exception.

One more suggestion may properly be added. It appears from the numerous petitions that have been laid before us for

preliminary advice, many of them obviously upon the suggestion, if not by the procurement, of the carriers themselves, that common comment on the law by the carriers and those who have heretofore enjoyed special favors at their hands, describes the system of penalties which the law provides as extreme, and the risks imposed upon unintentional and unwitting violators of its provisions as enormous. Such comment seems to us neither fair nor just. It is true that section 8 provides that for violation of the law, and for failure to do an act which the law requires, the offending common carrier shall be liable to the injured party for the actual damages sustained, together with a reasonable counsel or attorney's fee, to be fixed by the court, and collected with the costs in the case. It is also true that section 10 imposes a fine of "not to exceed \$5,000" upon common carriers and their officers, agents, and servants who wilfully do or cause to be done, or willingly suffer or permit to be done, any prohibited act, etc., upon conviction in a district court of the United States. The civil remedy described in section 8 adds an attorney's fee to the existing common law right of an injured party to recover the full amount of his damages, a condition of affairs which cannot greatly alarm corporations disposed to fair dealing; while the criminal remedy given in section 10 obviously pertains to intentional violations of the law, and the fine is in these cases to be graduated by the court according to the enormity of the offense.

Good faith, exhibited in an honest effort to carry out the requirements of the law will involve reasonable and fair-minded officials in no danger of damages or fines. The elasticity of the statute in their favor is noticeable. The unjust discrimination of section 2 must be "in a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions." The preference or or advantage of section 3 must be "undue or unreasonable." Throughout the act, as it now stands, in confessedly experimental form, there is exhibited an obvious and a generous pupose to allow to the corporations ample scope in the conduct of their business as common carriers for the people, and fair consideration of every reasonable claim,

while insisting upon just, impartial, open, and consistent rates of charge to which every citizen shall be subject alike whose situation is the same. Surely the people could not ask for less.

The language and the tenor of the act wholly fail to justify railroad managers, if any such there be, who refuse to accept responsibilities, decline to offer rates, neglect to announce conditions of traffic, embarrass the customary interchange of business, and impose stagnation upon trade while they "stick in the bark" of the phrases and expressions of the law, inventing doubts and imagining dangers. It is still more unjustifiable for railroad companies to make use of the general clauses of the law ignoring its modifying and enlarging words and formulas in order to impose additional burdens upon localities, trades, professions, manufacturers, consumers, classes of travelers or employes, straining and representing every construction in favor of the corporate treasury, and quoting the new law as their authority for all manner of petty exactions. The powers of the Commission are entirely adequate to cope with such conduct, the existence of which is not affirmed, although it has been somewhat publicly suggested. The same statute which enacts that charges for like service shall be uniform to all, also provides that charges in every case, and for every kind and class of service, shall be reasonable and just.

As the law is practically applied it is seen to contain many elements of advantage to the economical and profitable management of the business of the carriers, which they have not been slow to apprehend and take the benefit of. The Commission ventures to express the hope that with this explanation respecting the mutual functions of the carriers and the Commission in carrying the law into effect according to its true intent and meaning, there will be no lack of good faith and active co-operation in continuing the normal activity of every kind of reputable industry and traffic throughout the land under favorable, fair, and reasonable terms, conceding frankly to the people all the rights, benefits, advantages, and equal privileges which the "Act to Regulate Commerce" was intended to secure.

IN THE MATTER OF INDIAN SUPPLIES.

April 18, 1887.

When under the statute the government contracts for the delivery of the supplies needed for the Indian service, at New York and other points designated, and then advertises for bids for the transportation of the supplies from the points of delivery to the points where they are to be made use of, this transportation at the cost of the government is "for the United States" within the meaning of Section 22 of the Act to Regulate Commerce, and is not required to be made at the regular published rates.

COOLEY, *Chairman*.

On April 16, 1887, the Honorable H. L. Muldrow, Acting Secretary of the Interior, addressed to the Commission a communication of which the following is the material portion.

"It is provided in Sec. 22, of the Act entitled 'An Act to Regulate Commerce,' 'that nothing in this Act shall apply to the carriage, storage, or handling of property free or at reduced rates for the United States.'

"It is the practice according to the long-established method to invite proposals for delivery of supplies needed for the Indian service, at New York, Chicago, St. Louis, Kansas City, Omaha, Sioux City, St. Paul and San Francisco; and at the same time proposals are invited for the transportation of said supplies from the cities named to the various agencies, schools, etc.

"As these goods, going from the place of purchase, say New York, to the Indian agencies in the northwest or southwest, must pass over various lines of railroads or other public means of transportation, and must be hauled by teams in many cases from nearest railroad station or steamboat landing, to ultimate destination, the railroad companies and other public carriers have not directly or in their own names entered into competition for the service. It is the practice for individuals to secure special rates from competing public carriers, and on such special rates to make proposals for transporting the goods from place of purchase to their ultimate destination; and contracts are usually awarded to the

individual whose proposal is lowest or for the best interests of the service.

“The questions on which I desire to have your opinion, are:

“1st. Is it lawful under the Interstate Commerce Act for a common carrier to offer or make special rates to individuals in order that such individuals may offer and make proposals to this department for the transportation of Indian supplies; and

“2nd. Whether the transportation over the lines of common carriers, of Indian goods for and on behalf of an individual with whom a contract may be made by this department for their transportation from place of purchase to ultimate destination will be considered and held as ‘the carriage, storage, or handling of property, . . . at reduced rates for the United States’ under Section 22 of the Interstate Commerce Act?

“As this is an important and urgent matter, your early action thereon is respectfully requested.”

In reply the Commission directs the chairman to say that it does not understand it has any general power to construe the statute under which it is organized, for the purpose of guiding or controlling the actions of individuals in either private business or public duties, except when complaints under the law are brought to its attention for investigation and judgment, or when relief, which it is in its power to grant, is prayed. The Commission has, therefore, uniformly declined to express opinions on abstract questions of construction when they have been called for by private citizens or organizations, deeming it alike proper and prudent to do so. Deference to a department of the Government inclines the Commission to make an exception of this request, especially as a doubt regarding the rights of the Government might seriously affect the bids for transportation which are to be called for.

Coming to the questions then, the chairman is further directed to say that in the opinion of the Commission the statement made by you of the facts constitutes of itself a complete answer. The supplies, as the statement shows, are delivered to the Government at points designated, and they

are then transported at the cost of the Government to points where they are to be made use of. The transportation is, therefore, "for the United States" in the words of the Interstate Commerce Law, and it is immaterial that it is done by contractors when the Government receives the benefit of the free or reduced rates, as it must be presumed to do when the bids are made in reliance upon an assurance that such rates will be granted.

IN THE MATTER OF THE IOWA BARB STEEL WIRE COMPANY.

April 18, 1887.

The Interstate Commerce Commission has not been given authority to authorize the grant by railroad companies of special privileges to individuals or corporations, or to sanction such as are not in harmony with the the Act to Regulate Commerce, or to suspend that act for the benefit of particular industries.

Whether railroad companies ought to grant a particular special privilege which would not be illegal, the Commission will not undertake to say on an *ex parte* application.

A petition was presented by a manufacturing corporation which recited in substance that railroad companies had been accustomed to permit it to procure its raw material at a distance, manufacture its goods therefrom and then ship the goods to a market at the same aggregate rate for transportation of both raw material and manufactured goods as would be charged had there been no stoppage in transit and no manufacture; that this privilege of manufacturing in transit was valuable to the corporation and to the community in which its business was located, and wronged no one; and petitioner prayed that it might be sanctioned by the Commission. But no authority to that effect having been conferred upon the Commission, the petition was dismissed.

COOLEY, *Chairman* :

A petition is presented by this company which sets forth that its business is located at Marshalltown, Iowa, on several lines of railway; that the raw material for its manufacture comes from points east of Chicago, and after the same is manufactured, it is shipped southwest, west and northwest; that before the first day of the present month petitioners had an "equalized rate" of freight, which is ex-

plained to mean that the fixed rate of freight paid by petitioner from Chicago to Marshalltown, added to the rate paid from Marshalltown to the place of consignment of its manufactured goods, equalled the rate from Chicago to such place of consignment. For example, if the rate of freight from Chicago to the Missouri River was twenty-five cents, and petitioner had paid fifteen cents from Chicago to Marshalltown, its rate from Marshalltown to the Missouri River would be ten cents. This is averred to be a just and equitable arrangement, which has enabled the petitioner to build up a very considerable and reasonably profitable business, to give employment to a large number of mechanics and laborers, and to that degree to furnish a home market for farming products. It has proven satisfactory to petitioner and to the railroad companies, and beneficial to the city and surrounding country. It is also averred that while just to the petitioner, it has not been a discrimination against any other person or locality. And the petitioner prays on behalf of itself and other like manufacturers, that the Commission shall sanction the equalized rate, or at least suspend the operation of the new law as applied to the industry mentioned, and that railroad companies be authorized to refund to the manufacturers any excess they may have charged or collected from them before the Commission's construction or suspension has been made public.

From this statement of the petition it is apparent that what is prayed for is an exceptional privilege; a privilege not granted to manufacturers in general, and which must be of very great value to the line of trade which is thus favored. No doubt what is said in the petition is true, that the described industry has prospered in consequence, and that the city where it is located has received some share of the benefit. But whether a special privilege of the sort, granted to manufacturers on a single line, but not generally, is consistent with the rule of equity and justice which the Interstate Commerce law undertakes to establish, is a question upon which an opinion ought to be expressed only after the most careful consideration. The consequences of an answer favorable to the petitioner might to some extent injuriously af-

fect other interests, and give rise to complaints of discriminations; and the Commission ought clearly to see that duty requires an answer before it proceeds to give one on *ex parte* application.

The first question, then, to challenge the attention of the Commission, is whether the petition gives jurisdiction for any authoritative expression of opinion upon the facts stated. If it makes any complaint which comes under the cognizance of the Commission, or if it asks for any relief which it is in the power of the Commission to grant, it then becomes the duty of the Commission to consider the facts and apply its judgment; but if neither by complaint nor by application for relief is a case stated which will come within its jurisdiction, any expression of opinion upon the facts would be binding upon no one, and might be disregarded with impunity. The Commission has uniformly under such circumstances, declined to express opinions when private individuals or corporations have called for them.

The petitioner in this case makes no complaint of violation of law by the railroad companies; the complaint is that a privilege is not granted. But the privilege is one which, if lawful, the companies might withhold on their own view of what was dictated by their interest or their policy. On the other hand, if the privilege is one which the railroad companies cannot grant voluntarily because of its coming under the condemnation of the law, neither can the Commission give authority to grant it. The Commission has not been given a general dispensing power to relieve hardships under the law, but its power in that regard is strictly and carefully limited. The law lays down a general rule of equality of right and privilege, and the Commission has no more authority to make exceptions to that rule than have any other persons, except in the particular cases the law in terms provides for in Section four.

The case set out in this petition is not one of the exceptional cases for which the law provides. The Commission is therefore powerless to make any order upon it. Under such circumstances, it is proper and in accord with its practice to withhold any expression of opinion.

IN THE MATTER OF THE ST. LOUIS MILLERS' ASSOCIATION.

April 19, 1887.

The Commission reiterates that it has no authority to order or sanction the giving of special privileges.

“Milling in transit” having long been permitted by common carriers to millers at certain points, and a large quantity of “transits” being said to be out, which can be and are made use of to give millers at Minneapolis an advantage in rates over those at St. Louis, the Commission cannot correct the wrong by giving or authorizing special rates to the St. Louis millers.

COOLEY, *Chairman* :

The Commission is in receipt of a petition from the St. Louis Millers' Association, signed by Lewis Fusz as its president, and praying relief against discriminating rates said to prevail on transportation of flour from Minneapolis under what is known as the “transit” system, and which, while continued, is alleged to preclude the mills south and east of Minneapolis from competing with that point for domestic or foreign trade. We do not understand the petition to complain of the rates that have been established by railroads for the transportation of flour from Minneapolis under the Interstate Commerce Law, but on the contrary it concedes that the new rates are reasonable as compared with those from St. Louis. What is complained of is that there is on hand a large accumulation of what is known as “transits” which must control the rates until they are worked off, and that as a consequence the new rates are ineffective except as applied to local points between Minneapolis and Chicago. Thus, while the tariff is thirty-six cents per barrel from Minneapolis to Chicago, the actual rate is still ten cents per barrel, and the milling interests in all other sections of the country are paralyzed by such a monstrous discrimination.

The petition does not clearly indicate the relief which the Association thinks it is entitled to. It is clear that the Commission could not grant relief by giving to St. Louis exceptional advantages corresponding to those which Minneapolis is said now to enjoy. That would be a discrimination against

other localities as indefensible and as much opposed to the spirit of the law as the transit system itself. Neither could the Commission compel the railroads upon which St. Louis relies for transportation to reduce their rates on flour to the level of what is said to be the actual rates from Minneapolis, when, as the petitioner concedes, a higher rate is reasonable. If the "transit" system is pernicious, it would obviously be unwarrantable for the Commission to order or sanction anything that would extend or perpetuate the mischief.

It may be questionable, perhaps, whether the so-called "transits" have such validity in law that the companies issuing them are bound to give transportation according to their terms when the effect would be to discriminate in rates in favor of one or more localities against others. That question, however, is not brought before us by the petition, and could only be raised in some proceeding which would directly present it, and in which parties interested would have opportunity to be heard.

IN THE MATTER OF THE UNITED STATES COMMISSION OF FISH AND FISHERIES.

April 19, 1887.

The United States Commission of Fish and Fisheries being one of the Agencies of Government, and the distribution of fish and fish eggs by it being made by authority of the Government, the transportation of the fish and fish eggs so distributed falls within the exception contained in Section 22 of the Act to Regulate Commerce, and the rate is not governed by the published tariff.

The question of free transportation to employees and agents of the Commission and of the National Museum raised but not passed upon.

On April 19, 1887, the following communication was received by the Commission :

UNITED STATES COMMISSION OF FISH AND FISHERIES, }
WASHINGTON, D. C., April 16, 1887. }

The President of the Interstate Commerce Commission.

SIR:—For many years past the United States Fish Com-

mission has enjoyed certain privileges given to it by the railroads, of the United States, with scarcely an exception, with regard to the transportation of fish and eggs from one part of the country to another in cars built specially for the purpose, and attached to passenger and express trains. The usual rate for such service to private individuals, when not performed as a matter of courtesy for railroad officials of other roads, is from 18 to 25 fares, which at an average rate of three cents per mile would represent from 54 to 75 cents per mile. The highest charge made by any of the roads to the Commission is 20 cents per mile for a car and five messengers, regular fares being paid for any number of persons above five. In many cases the cost of service is even less, being established by some roads at ten cents per mile ; while in repeated instances no charge whatever is made ; the car and messengers being carried free. It is estimated that the reduction in cost to the United States by these concessions amounts to not less than twenty or thirty thousand dollars per annum. The appropriations made by Congress would be entirely inadequate to meet the cost of operations of transportation but for the concessions in question ; and the scope of the work of the Commission would be greatly reduced if full payment was required.

The railroad companies are all interested in the work of the Commission, and especially in having proper plants of fish made along their lines ; thus increasing the food resources of the country traversed, and inducing a considerable amount of travel on the part of anglers and others.

I find in Section 22 of the Act the following clause : "That nothing in this Act shall apply to the carriage, storage or handling of property free or at reduced rates for the United States, State or municipal governments, or for charitable purposes," etc. ; and I now beg to inquire whether this applies to the service in question, and whether I may assure such railroads as are willing to continue the favor, that their favorable action in the premises would be legal. I ask for an answer at your early convenience, as the work of distribution of shad to the west should begin at an early day.

I would also ask to be informed whether the railroads may

continue their practice of issuing to the U. S. Fish Commission and the National Museum passes to enable their explorers and agents to carry out their official duty at less expense to the United States. It is of course understood that all passes to be used on private business are to be excluded; but a large sum of money is saved annually to the Government by the practice in question. I have not yet ascertained whether the railroad companies would be willing to continue their liberal action in this respect, but desire to have some ruling from you on the subject.

Very respectfully,

SPENCER F. BAIRD,
U. S. Commissioner Fish and Fisheries,
Secretary Smithsonian Institute.

SCHOONMAKER, *Commissioner*, replying, said :

As the United States Commission of Fish and Fisheries is one of the agencies of the Government, and the distribution of fish and fish eggs is by authority of the Government, it would seem clear that such transportation falls within the exception in the 22nd Section of the Act to regulate commerce, recited in the communication.

[And after citing as conclusive on this branch of the inquiry the opinion *In the Matter of Indian Supplies*, be continued.]

The other branch of the inquiry "whether the railroads may continue their practice of issuing to the United States Fish Commission and the National Museum passes to enable their employees and agents to carry on their official duty at less expense to the United States, the Commission declines to express any opinion upon in advance of an actual case that may be presented for its official action.

The act is silent upon the question of passes or free carriage for officers or agents of the Government, and manifestly the question should only be considered and decided upon a hearing after complaint, should any be presented, for alleged violation of the law.

IN THE MATTER OF THE EXPORT TRADE OF BOSTON.

April 23, 1887.

It seems not to be illegal for railroad companies connecting Boston with western points to make the rates from such points to Boston upon grain and provisions for export as low as the rates to New York, although the rates upon like property for local consumption are higher to Boston than to New York, the distance being somewhat greater. Reasons given why this may be a necessity of the situation.

OPINION OF THE COMMISSION.

COOLEY, *Chairman*.

Several petitions regarding this trade are before us: One from the Fitchburg Railroad Company, and others from the Boston and Lowell, the New York and New England, the Central Vermont line, and the Boston and Albany railroad companies. All seek the same relief, and upon a state of facts, which may be summarized as follows:

For many years it has been the practice of the railroad companies connecting Boston with western points, to make the rates from such points to Boston, upon grain and provisions for export, as low as the rates to New York, although the rates upon property for local consumption have during the same time been higher to Boston than to New York, the distance being somewhat greater. The rates to the seaboard and abroad, it was shown, are in effect determined by the shortest line from the interior, which for this purpose is the Pennsylvania line; the other lines conforming substantially to those rates as a security to participation in the traffic.

The equalization of rates upon the export business has sometimes been made by way-billing to Boston at New York rates, but as this is not always practicable it has more commonly been made by paying a rebate equal to the difference between Boston and New York rates.

Making the allowance in some form has been essential to the existence of the trade, since the ocean rates from Boston and New York are not materially different, and higher interior rates would exclude Boston altogether from participation in the foreign trade.

The practice which allows the rebate has, therefore, been adopted in a spirit of fairness to Boston and as a convenient method for equalizing the rates from western points to the foreign market, whether the route chosen by the shipper for his traffic be by way of Boston or of New York.

The petition of the Fitchburg Railroad Company states that "the New England railroads have been advised by the unanimous opinion of the counsel consulted by them that this practice was not illegal under the Interstate Commerce Bill inasmuch as the terms are available for all engaged in the like and contemporaneous transportation of such traffic under similar circumstances and conditions, and being equal to those by New York are neither unjust or unreasonable. This commercial usage has in fact been looked upon as a vested right of this port (Boston), and upon the faith of its continuance vast sums have been expended to accommodate and permanently continue the export business. Unfortunately, however, adverse legal opinions have apparently been rendered by the advisers of the trunk lines, whose action, guided thereby, has practically stopped the practice, and has seriously embarrassed the Boston export business, and threatens to put a stop to it, to the great detriment of the road and the business interest of Boston."

The prayer of the petition is that the Commission "authorize the trunk lines to bill export freight to Boston at New York rates, or take such other action as may seem best in order that this business may be continued upon as fair and favorable a basis as it has been done hitherto."

The other petitions are not essentially different. A hearing was had upon all together, and evidence was taken in support of their allegations of fact. A party interested in the local grain and provision trade of Boston was also heard in favor of the contention that any concessions made in favor of the export trade of Boston ought in fairness to be extended to all other persons to whom grain and provisions may be consigned at that city from interior markets.

It was shown on the hearing that the Boston export trade was for the time being under considerable embarrassment arising from a doubt whether the railroad companies might

lawfully continue the rebate which has been heretofore allowed. It was not so evident, however, that the Commission had the power to give relief. Indeed the petitioners when called upon to point out the provision of the Interstate Commerce Law under which the Commission had authority to grant the relief prayed, frankly confessed there was difficulty in doing so. It was stated, however, that there were times when the rebate exceeded the ocean rates, and that then a suspension of the operation of the fourth section of the Act would be necessary, since otherwise the railroad companies would be liable to penalties for charging and receiving a greater sum for the transportation of grain and provisions from western points to Boston than from the same western points through Boston to the foreign market. But a case of this sort, it was conceded, would be quite exceptional, so that a suspension of the long and short haul clause of section four would not alone give the relief required.

What the companies desire is authority to continue payment of the rebate as well when it falls short of the ocean rates as when it exceeds it.

If what is paid under the name of a rebate were a rebate in fact, as understood in the second section of the Interstate Commerce Law, and if the effect of allowing it were to impose upon some classes of persons a greater charge for service rendered than was imposed upon others for a like and contemporaneous service, under the same circumstances, and conditions, and so effect what is described in the law as an unjust discrimination, it would neither be legal in itself nor could it be made legal by any order, assent, or permission made or given by the Commission. But as explained by the petitions and the evidence adduced in their support, the rebate has for its purpose to correct an inequality that would otherwise exist, and which, by making the cost of foreign shipments by way of Boston greater than by way of New York, would practically exclude shippers from the choice of the Boston route, though the distance from interior points to the foreign market would be practically no greater by that route than by the other. This alleged necessity for the equalization of rates on export traffic is

relied upon as the justification for the higher rate which is imposed on the traffic whose final destination is Boston, which higher rate, however, is averred to be in itself just and reasonable. If such is the real nature of the so-called rebate—if its purpose is only to do indirectly what might directly be done by bill of lading issued at the interior point of shipment for the delivery of the goods at the foreign destination, and if no discrimination is made between persons engaged in the foreign traffic, but the rebate is paid impartially, and only as a means of protecting the Boston route for the export trade against an excess in charge that would be ruinous to it, then it is obvious there is no occasion for calling upon the Commission to give sanction to a practice which would be legal without it. Indeed any legal ground for affirmative action on the part of the Commission is precluded when those who bring the practice to its attention do so with explanations of its propriety and insisting upon its lawfulness.

Whether all freights from interior points to Boston ought to be carried at rates as low as those prevailing from the same points to New York, is a question not legitimately before the Commission now.

The railroad companies, who are the only parties asking action at our hands, justify the differences now made on the ground of longer haul, while submitting to the rebate on the export trade, under a species of compulsion. If the exactions from the Boston traffic proper are excessive, the fact can only be adjudicated when somebody questions them in a proceeding instituted for the purpose of a regular investigation.

It follows from what has been said that no order should be made on the petitions, and the petitioners have leave to withdraw them.

MORRISON, Commissioner, concurs in the determination to make no order in the premises, and that leave be given to withdraw the petitions.

IN THE MATTER OF DISABLED SOLDIERS AND SAILORS.

May 19, 1887.

Whether since the passage of the Act to Regulate Commerce it is competent for the carriers subject to it to grant free transportation of persons to those who are proper subjects of charity, the Commission will not undertake to say when no controversy is pending before it, which raises the question.

SCHOONMAKER, *Commissioner*.

Commissioner John C. Black, of the Pension Bureau, presented a petition with accompanying papers on behalf of the members of the National Home for Disabled Volunteer Soldiers and Sailors, which set forth that prior to the taking effect of the "Act to Regulate Commerce" the various railroads of the country carried the members to and from their various Homes at half rates of fare; that the great trunk lines have signified their willingness to continue to do so, but that the other roads decline. The papers do not show the reason for their declination.

The petition asks for "a ruling by this Commission, or an order or opinion which will authorize" the objecting railroads to pursue the same course as the trunk lines "and permit the Homes and their members to receive, and the railroads of the United States to extend the half-fare rate to the Homes and their members."

If any communication had been presented from any objecting road or roads, stating the grounds of their objection, the Commission might have been better able to judge of the sufficiency of those grounds. In the absence of any such statement of reasons it may be assumed that the objection is based upon the second section of the Commerce Act, which provides that if any carrier subject to the provisions of the act shall by any special rate, etc., charge, etc., less compensation for the transportation of persons or property than it charges others for a like and contemporaneous service, under substantially similar circumstances and conditions, such car-

rier shall be deemed guilty of unjust discrimination, which is prohibited and declared to be unlawful.

The meritorious character of this application and the patriotic and humane reasons urged in support of it are fully appreciated and admitted. But the Commission is not referred to any provision of the Act that authorizes it to make an order or express an opinion upon an *ex parte* application of this nature. In the absence of such authority an order or an opinion would have no validity or weight whatever. The fourth section of the Act, relating to long and short hauls, is the only one that confers discretionary power upon the Commission to make orders for relief in special cases, and then, only upon the application of carriers.

The twenty-second section of the Act defines the cases in the transportation of property and persons to which the act shall not apply, and ministers of religion and officers and employes of railroads are the only persons specified. The statute as enacted must be deemed to express the deliberate will of the law making body and the Commission is powerless to enlarge or restrict its scope. Nor can a construction be given to it not warranted by the language employed.

If the fair meaning of the second section is that the giving of half rates to the members of National Homes for Disabled Volunteer Soldiers and Sailors is the allowance of a special rate, etc., for a like and contemporaneous service, for certain persons not common to all, under substantially similar circumstances and conditions, then such allowance would be unjust discrimination ; otherwise not.

The trunk lines, according to the petition, have taken the responsibility of assuming that the allowance of the half rates desired does not constitute unjust discrimination. Every carrier has the same right to assume its own construction of this provision. The Commission can not prematurely impose any construction upon a carrier however much some particular construction may be desired. Construction is a judicial act involving the decision of some controverted question. The orderly methods of judicial procedure must be observed. The jurisdiction of the Commission in such cases is limited to the decision of complaints for alleged vio-

lations of the law, upon a hearing of the parties interested, and its opinion of the intent of the statute can then be announced with authority.

Any order or opinion in advance of a complaint and hearing would be misleading and unfair to those who might be affected by it, and would be unauthorized and nugatory. The Commission is therefore constrained to say that it has no power to comply with the request of the petition.

THE MISSOURI AND ILLINOIS RAILROAD TIE AND LUMBER CO. v. THE CAPE GIRARDEAU AND SOUTHWESTERN RAILWAY CO.

May 19 and June 9, 1887.

The fact that the owner of merchandise which is offered to a carrier for transportation from one point to another in the same State, intends to have it further transported by a second carrier into another State, does not make such first transportation interstate commerce, or render the carrier subject to the control of the Commission in respect to it, even though such first carrier may be informed of the ultimate destination of the merchandise.

Complaint of unjust discrimination.

The complainant is engaged in getting out ties along the line of the defendant's road, some of which it desires to transport over that road to Cape Girardeau, on the Mississippi river, where it has a contract for their delivery. The managing officers of the defendant are informed that the ties are to be taken by boat at Cape Girardeau across the river into Illinois, but such transportation across the river is entirely independent of the transportation requested of the defendant, and it will be by boats not in any respect under the control of the defendant, or forming a continuous line with it, or operated with it under any common arrangement.

The complaint made of the defendant is, that it fails to give the complainant cars for the transportation of its ties on request, though at the same time it gives cars to a rival dealer.

The road of the defendant is entirely within the State of Missouri.

When the complaint was presented the Commission called attention to the fact that the transportation asked for would be entirely within the State of Missouri, and, therefore, apparently not within the jurisdiction of the Commission. Complainant relied upon the fact as giving jurisdiction, that the ultimate destination of the ties was another State, and the defendant knew the fact; but as it appeared the defendant was to be in no way connected with any transportation out of the State; this was held to be unimportant, and the Commission declined to entertain the complaint.

IN THE MATTER OF THE PETITION OF THE LOUISVILLE AND NASHVILLE RAILROAD CO.

April 5 and June 15, 1887.

When a railroad company claims that the circumstances and conditions of long and short hauls on its line are so dissimilar as to justify its making the greater charge on the shorter haul, the Commission will not on its petition decide upon the justice of its claim, but will leave it to take the initiative in fixing rates, and will decide upon their justice and propriety when complaint is made by persons or localities who consider themselves injured.

On questions of statutory construction involved in such cases the Commission holds:

First. That the prohibition in the fourth section of the Act to Regulate Commerce against a greater charge for a shorter than for a longer distance over the same line in the same direction, the shorter being included in the longer distance, as qualified therein is limited to cases in which the circumstances and conditions are substantially similar.

Second. That the phrase "under substantially similar circumstances and conditions" in the fourth section, is used in the same sense as in the second section; and under the qualified form of the prohibition in the fourth section carriers are required to judge in the first instance with regard to the similarity or dissimilarity of the circumstances and conditions that forbid or permit a greater charge for a shorter distance.

Third. That the judgment of carriers in respect to the circumstances and conditions is not final, but is subject to the authority of the Commission and of the courts, to decide whether error has been committed, or whether the statute has been violated. And in case of complaint for

violating the fourth section of the act the burden of proof is on the carrier to justify any departure from the general rule prescribed by the statute, by showing that the circumstances and conditions are substantially dissimilar.

Fourth. That the provisions of section one, requiring charges to be reasonable and just, and of section two, forbidding unjust discrimination, apply when exceptional charges are made under section four as they do in other cases.

Fifth. That the existence of actual competition which is of controlling force, in respect to traffic important in amount, may make out the dissimilar circumstances and conditions entitling the carrier to charge less for the longer than for the shorter haul over the same line in the same direction, the shorter being included in the longer, in the following cases:

1. When the competition is with carriers by water which are not subject to the provisions of the statute.
2. When the competition is with foreign or other railroads which are not subject to the provisions of the statute.
3. In rare and peculiar cases of competition between railroads which are subject to the statute, when a strict application of the general rule of the statute would be destructive of legitimate competition.

Sixth. The Commission further decides that when a greater charge in the aggregate is made for the transportation of passengers or the like kind of property for a shorter than for a longer distance over the same line in the same direction, the shorter being included in the longer distance, it is not sufficient justification therefor that the traffic which is subjected to such greater charge is way or local traffic, and that which is given the more favorable rates is not.

Nor is it sufficient justification for such greater charge that the short-haul traffic is more expensive to the carrier, unless when the circumstances are such as to make it exceptionally expensive, or the long-haul traffic exceptionally inexpensive, the difference being extraordinary and susceptible of definite proof.

Nor that the lesser charge on the longer haul has for its motive the encouragement of manufactures or some other branch of industry.

Nor that it is designed to build up business or trade centers.

Nor that the lesser charge on the longer haul is merely a continuation of the favorable rates under which trade centers or industrial establishments have been built up.

The fact that long haul traffic will only bear certain rates is no reason for carrying it for less than cost at the expense of other traffic.

Petition for relief under the fourth section of the Act to Regulate Commerce.

On April 5th, 1887, the Southern Railway and Steamship Association was composed of the following railroad companies, lines and systems, and steamship lines operated in connection therewith: Alabama Great Southern Railroad; At-

lanta and West Point Railroad Company ; Central Railroad of Georgia System ; Cincinnati, New Orleans and Texas Pacific Railway Company ; East Tennessee, Virginia and Georgia Railway Company ; Georgia Railroad Company ; Georgia Pacific Railway Company ; Louisville and Nashville Railway Co.'s System ; Nashville, Chattanooga and St. Louis Railway Company ; Norfolk and Western Railroad Company ; Port Royal and Augusta Railway Company ; Richmond and Danville Railway Company ; Rome Railroad Company ; Savannah, Griffin and North Alabama Railroad Company ; Seaboard and Roanoke Railroad Company ; South Carolina Railway Company ; South and North Alabama Railway Line ; Western Railroad of Alabama ; Western and Atlantic Railroad Company ; Atlantic Coast Line System ; Baltimore, Chesapeake and Richmond Steamboat Company ; Boston and Savannah Steamboat Company ; Clyde Steam Lines ; Merchants' and Miners' Transportation Company ; New York and Charleston Steamship Company ; Ocean Steamship Company ; Old Dominion Steamship Company.

On the day mentioned the Association presented to the Commission on behalf of all the roads, systems and lines mentioned its petition that under the Act to Regulate Commerce they be authorized to charge for the transportation of property less for longer than for shorter distances over the same lines in the same directions between certain specified points. This petition being unimportant to a presentation of the legal questions, is not here recited.

The Louisville and Nashville Railroad Company also filed its separate petition as follows :

To the Honorable the Interstate Commerce Commission :

The petition of the Louisville and Nashville Railroad Company, a corporation chartered by the Commonwealth of Kentucky, would respectfully show unto your honorable Commission as follows, viz. :

The Louisville and Nashville Railroad Company was originally chartered to construct a railroad from Louisville, Ky., to Nashville, Tenn., with a branch to Lebanon, Ky., and one from a point five miles south of Bowling Green to the State

line near a point now known as Guthrie, in the direction of Clarksville and Memphis, Tenn. Construction was commenced from Louisville, southward, in 1853, and from Nashville, northward, in 1856, and work progressed from each end until connection was made at or near Bell's (Glasgow Junction), in the year 1859.

The Lebanon branch was extended from time to time and completed to Rockcastle river, a distance of 140 miles from Louisville, in 1870; and was farther extended to Jellico, Tenn., in 1883, there connecting with the Knoxville and Ohio Railroad.

The Memphis branch was completed in 1860.

The Memphis and Ohio Railroad Company was chartered to construct a Railroad from Memphis to Paris, Tenn. Construction was commenced in 1856, and gradually extended to Paris, to which point it was completed in 18—.

During the year 1860 or 1861 the Memphis, Clarksville and Louisville railroad, extending from the State line near Guthrie, Ky., to Paris, Tenn., was completed.

The Louisville and Nashville Railroad Company acquired by lease the property of the Memphis and Ohio Railroad Company in September, 1867, and it was afterwards consolidated into the Louisville and Nashville Railroad Company in October, 1872. The Louisville and Nashville Railroad Company acquired by purchase the property of the Memphis, Clarksville and Louisville Railroad Company on October 1st, 1871. The three railroads thus formed a continuous line from Louisville to Memphis.

On July 1st, 1872, the Louisville and Nashville Railroad Company acquired by lease control of the Nashville and Decatur Railroad, extending from Nashville, Tenn., to Decatur, Ala., 122 miles.

The South and North Alabama Railroad Company was chartered to construct a railroad from Montgomery, Ala., to Decatur, Ala. That company, unable to secure the means, failed to complete the road. In 1871 the Louisville and Nashville Railroad Company entered into an agreement to complete the road, and to receive in part compensation therefor a controlling interest in the stock of the South and North

Alabama Railroad Company. The road was completed and opened for traffic in 1872, since which time it has been under the stock control of the Louisville and Nashville Railroad Company.

In 1880 the Louisville and Nashville Railroad Company purchased the property of the Mobile and Montgomery Railroad Company, the road extending from Montgomery, Ala., to Mobile, Ala., 180 miles, and in 1880 it purchased the property of the New Orleans and Mobile Railroad Company, the road extending from Mobile to New Orleans, 141 miles.

In 1880 the Louisville and Nashville Railroad Company purchased the Pensacola Railroad, extending from Pensacola Junction (Flomaton) to Pensacola, 43 miles.

In 1879 the Louisville and Nashville Railroad Company purchased the property of the Evansville, Henderson and Nashville Railroad Company, the railroad extending from Henderson, Ky., to Nashville, Tenn., 145 miles.

In 1881 the Louisville and Nashville Railroad Company acquired control of the Southeast and St. Louis Railway and branches by lease, the road extending from Evansville, Ind., to East St. Louis, Ill., 161½ miles, with a branch from McLeansboro' to Shawneetown, on the Ohio river, 40 miles long.

In 1880 the Louisville and Nashville Railroad Company purchased a controlling interest in the stock of the Owensboro' and Nashville Railroad Company, the road at that time extending from Owensboro' to Central City, 35½ miles. It has since furnished the means to extend the road from Central City to Adairville, 84 miles in all.

In 1881 the Louisville and Nashville Railroad Company purchased the property of the Louisville, Cincinnati and Lexington Railway Company, the road extending from Louisville, Ky., to Lexington, Ky., 94 miles, and from Lagrange, Ky., to Cincinnati, Ohio, 83 miles, and secured thereby control, by lease, of three smaller corporations. The total length of lines owned, controlled by ownership of stock, or operated under lease by the Louisville and Nashville Railroad Company, including some branch lines not herein enumerated, is 2,106.64 miles—practically all of which is subject to the provisions of the "Act to Regulate Commerce."

In this petition the term local tariffs is intended to apply to the rates of transportation to and from local stations as distinguished from rates between competitive stations.

When the Louisville and Nashville Railroad Company commenced the construction of its road from Louisville in the direction of Nashville, and from Nashville in the direction of Louisville, it adopted rates of transportation for both passengers and freight materially less than had ever prevailed before and less than the rates authorized by its charter. These rates have been changed from time to time, the changes having in all cases been reductions; so that the average rate per ton per mile and per passenger mile now received to and from local stations is much less than during the years immediately succeeding the construction of the road. As the company acquired by lease or by purchase the property of other companies, or their control by ownership of stock, it in all cases substituted rates of transportation to and from local stations materially less than had been received by the companies formerly owning or controlling the properties, and less than had prevailed before said companies were chartered; and it has, since acquiring control of such companies, made material reductions in the rates for transportation of both freight and passengers, so that the rates now received per ton per mile and per passenger mile are very much less than those received for some time after such control was secured. These reductions in some cases have been as much as fifty per cent., local passenger rates having been reduced over nearly the entire system from four, five, and six cents per mile to three cents per mile, with a corresponding or even greater reduction in the rates of transportation to and from local stations on many articles of freight. These rates are believed and are averred to be just and reasonable.

Reference to the map herewith filed, and marked Exhibit A hereto, will show that the lines of the Louisville and Nashville Railroad Company comes in contact with water transportation at numerous points. The traffic of but few large corporations in the country is to so large an extent affected by water competition.

All traffic carried by the Louisville and Nashville Railroad

Company *between* the following named points is taken in direct competition with water carriers not subject to the provisions of the "Act to Regulate Commerce:" Cincinnati, Ohio; Newport, Ky.; Frankfort, Ky.; Louisville, Ky.; Owensboro', Ky.; Henderson, Ky.; Bowling Green, Ky.; Clarksville, Tenn.; Nashville, Tenn.; Tennessee river station (or Danville), Tenn.; Memphis, Tenn.; Montgomery, Ala.; Selma, Ala.; Mobile, Ala.; New Orleans, La.; Pensacola, Fla.; Evansville, Ind.; Shawneetown, Ill.; East St. Louis, Ill., and St. Louis, Mo.

In addition to the above mentioned competition of carriers, not subject to the Act to Regulate Commerce, there is also the competition of rail lines, or of rail and water lines, for traffic passing between most of the points enumerated. Besides the traffic passing between the points above enumerated, all, or most of the traffic passing between such points, and points beyond them, is taken in competition with carriers not subject to the Act. To illustrate: Traffic between New York and other Eastern cities, and Louisville, Ky.; Owensboro', Ky.; Henderson, Ky.; Clarksville, Tenn.; Nashville, Tenn., and Memphis, Tenn., may be, and is, shipped by consignors to Cincinnati, consigned to a forwarding merchant, or to an agent of water carriers, the contract for shipment only providing for delivery to such merchant, or agent, who, on receipt of the property, forwards it to destination, neither the rail carrier, nor the water carrier, being a party to any arrangement for a continuous carriage.

Traffic passing between New York and other Eastern cities and New Orleans, La.; Mobile, Ala.; Selma, Ala.; and Montgomery, Ala., is taken in competition with water carriers not subject to the provisions of the act. There are also numerous rail lines, and rail and water lines, competing for this traffic.

Traffic passing between points not on this company's lines, but for which this and connecting lines compete, is also subject to similar competition of lines not subject to the Act. As an illustration, traffic passing between Chicago, Illinois, and Savannah, Georgia, may be, and is, shipped by consignors from Chicago on contracts requiring delivery to a forwarding mer-

chant, or to an agent of a water carrier at Baltimore, Maryland, who forwards the same to destination, the shipment not being covered by any through contract or arrangement. This company and its connections also compete with other all rail, and with rail and water lines for traffic passing between the same points, some of which lines are not subject to the provisions of the act.

All traffic passing between nearly all points North, West, and East, like Cincinnati, Chicago, St. Louis, Pittsburgh, Philadelphia, New York, and points South, Southeast, and Southwest, like Savannah, Charleston, Augusta, points in Florida, Montgomery, Selma, Mobile, New Orleans, points in Arkansas, and in Texas, is subject to similar competitive conditions.

Traffic subject to still other competitive conditions, is that passing between points, one or both of which may not be located upon this company's lines, but for which it, and its connections have to compete with all-rail, and with rail and water lines, which may be subject to the provisions of the Act, to wit, traffic passing between Chicago and Atlanta, Ga., or New York and Birmingham, Ala. Nearly all traffic passing between points on, and north of, the Ohio, in the Northeast, and Northwest, as Louisville, Indianapolis, St. Louis, Pittsburgh, etc., and points in the South, Southeast, and Southwest, such as Atlanta, Ga.; Macon, Ga.; Chattanooga, Tenn.; Birmingham, Montgomery, and Selma, Ala.; New Orleans, La.; Little Rock, Ark., and points in Texas, is subject to such competition.

Then, again, there is traffic for which, practically, only all rail-lines compete, such as that passing between Cincinnati, Ohio, and Chattanooga, Tenn.; Louisville, Ky.; and Birmingham, Ala.; Louisville, Ky.; and Atlanta, Ga. While such traffic may be, and has been, to some extent competed for by a rail and water line, in practice such competition is not effective, and does not have a material influence in the adjustment of rates. Rates between such points may be said to be adjusted by the competition between the rail lines; but, in effect, they are made relative to rates between other points. To illustrate: The Rates from St. Louis to Birming-

ham, Ala., being fixed by the competition between the river and rail routes via Vicksburgh, New Orleans, Memphis, Cairo, etc., and the all-rail lines running from St. Louis to Birmingham, those rates fix the rates from Louisville, Ky., to Birmingham, Ala.; and the rates from Chicago to Atlanta being fixed by competition between the rail and water lines via Baltimore, and the all-rail lines, those rates fix the rates from Cincinnati, Ohio, to Atlanta, Ga.

An examination of this company's tariffs heretofore submitted to this Commission will show, that in many instances, the rates of transportation for the shorter are greater than for the longer distance, over the same line, in the same direction, the shorter being included within the longer distance. But this is only the case where the circumstances and conditions are, as petitioner is advised, and insists, substantially dissimilar. As an illustration, the rates between Louisville and the intermediate stations are, as hereinbefore shown, just and reasonable; and, while the rates between Louisville and Nashville, on most classes of traffic, are less than between Louisville and some of the intermediate stations, the rates between Louisville and Nashville are fixed by competition with water lines, and the rail line can secure only what the transportation between such points is worth to the shipper; which is what the water lines will accept for carriage, plus the value to the shipper or owner of the property, of prompt transportation, and the absence of marine risk. With perhaps but two exceptions, the rates between points on the lines owned, controlled, or operated by the Louisville and Nashville Railroad Company, are not less for the longer than for the shorter haul, except between points where water carriers, not subject to the act, compete. The rates to and from railroad-crossing points like McKenzie, Tenn.; Milan, Tenn.; Humboldt, Tenn.; Danville Junction, Ky.; Stanford, Ky.; Livingston, Ky.; Nortonville, Ky.; Central City, Ky., and other points, are not less than the rates from intermediate local stations.

Cincinnati, Ohio; Newport, Ky.; Louisville, Ky.; Frankfort, Ky.; Henderson, Ky.; Clarksville, Tenn.; Nashville, Tenn.; Memphis, Tenn.; Montgomery, Ala.; Selma, Ala.;

Mobile, Ala.; New Orleans, La.; Evansville, Ind.; Shawneetown, Ill.; East St. Louis, Ill.; St. Louis, Mo., were natural commercial centres or points where traffic was interchanged with the surrounding country, before railroads were constructed to or from them. They were natural commercial centres, or distributing points, by virtue of their natural location, and of the facilities they enjoyed by reason of water transportation. As railroads were constructed across the country which intervened between those natural commercial centres, they provided facilities for the country through which they passed, superior to those theretofore possessed, and at greatly reduced rates, such rates being just and reasonable. When the roads were completed between those natural commercial centres—where they came in competition with water lines which also connected those centres—they found the circumstances and conditions entirely dissimilar from those which existed at intermediate stations in the intervening country. The volume of traffic concentrated at such points was found to be many times greater than at intermediate stations, and that the value of the transportation to shippers was fixed by competition with water carriers, as hereinbefore described. The railroad companies adjusted their rates to the conditions found to exist when the roads were so completed. They did not attempt to materially disturb the relations of such distributing centres as Louisville, Nashville, etc., with the surrounding country.

While the competition between the rail lines, and water lines, has materially reduced the rates of transportation between these natural commercial centres, they have also furnished much improved facilities to the intermediate local stations at greatly reduced cost; such intermediate points participating in any reduction in rates between the competitive points. As an illustration, the rates from Louisville to Franklin, Tenn., are never greater than the rates from Louisville to Nashville, plus the rates from Nashville to Franklin. The rates from New York to Brownsville, Tenn., are never greater than the rates from New York to Memphis, plus the rates from Memphis to Brownsville; so that the

last-named point always receives the benefit of any reduction in rates to Memphis, resulting from competition between the all-rail lines and the water lines, between the all-rail lines and all-rail lines, and between all-rail lines and rail and water lines.

Rates between points on this company's lines, and points beyond this company's lines, for the traffic of which this company competes, and Savannah, Charleston, Port Royal, Brunswick, Florida points, etc., are less than to intermediate points to which the distance is shorter; as Augusta, Atlanta, Macon, etc. The circumstances and conditions are dissimilar; as the competition of the water carriers, and of the rail and water carriers, between the points of shipment and Savannah, Charleston, etc., renders transportation of less value to the shipper or owner.

The practice of making rates between points on this company's lines, and local stations on connecting lines, greater than to competitive points beyond, is also in effect. As an illustration, the rates from Louisville to some of the stations on the Western and Atlantic railroad, between Chattanooga and Atlanta, are greater on some articles than from Louisville to Atlanta, the circumstances and conditions being dissimilar; traffic to and from Atlanta being secured in competition with numerous competing lines and markets, and the volume of traffic being far greater.

There is another condition of competition where rates are made less for the longer than for the shorter distance over the same line, and in the same direction, as illustrated by the rates in effect between Cincinnati, Ohio, and Lexington, Ky. The line operated by the Louisville and Nashville Railroad Company between these points is an indirect line, the distance being one hundred and fifty miles. There are two other all-rail lines competing for the traffic between the same points; one, the Kentucky Central, distance ninety-nine miles, the other the Cincinnati Southern, distance seventy-nine miles. The rates submitted heretofore between these points are the rates fixed by the shorter lines. The rates between Cincinnati and some of the local stations on the Louisville and Nashville railroad are greater on many

articles than between Cincinnati and Lexington ; and the rates between Louisville and some of the intermediate local stations, on many articles, are greater than between Louisville and Lexington. It is believed that the circumstances and conditions are sufficiently dissimilar to justify this practice.

The same basis of adjusting rates is in effect, and has been in effect ever since through rates have been made, throughout the entire country, or at least throughout that portion of the country for the traffic of which this company competes.

It is believed that the rates as set forth in the tariffs heretofore submitted to the Commission by this company are in compliance with the spirit and letter of the "Act to Regulate Commerce." Should any of the rates prove to be not so adjusted, errors and omissions of that character will be promptly corrected when ascertained.

As a matter of interest the following statement is submitted, showing the number of tons, ton miles, revenue, rate per ton per mile, and percentage of revenue derived from the transportation of property moved by the Louisville and Nashville Railroad Company over lines owned, leased, and operated, to and from local stations and between competitive points, and total during the fiscal year ended June, 1886.

	Tons.	Ton miles.	Revenue.	Rate per ton per mile.	Percentage.
Local	8,509,152	443,157,776	6,558,694.54	1.480	66.9
Competitive.....	1,038,102	326,554,141	3,245,124.43	.994	33.1
	<hr/> 9,547,254	<hr/> 769,711,917	<hr/> 9,803,818.97	<hr/> 1.274	<hr/> 100

As the profit per ton for transporting local traffic is greater than that received for the transportation of competitive traffic, it is estimated that not less than 80 per cent. of the net earnings accruing to the Louisville and Nashville Railroad Company from the transportation of property is derived from that which is moved to and from local stations.

If petitioner is forced to abandon either its competitive or

its local traffic, self-preservation will force it to abandon the competitive traffic, from which so small a proportion of its net revenue is derived.

While the abandonment of its competitive traffic will inflict a loss upon petitioner of over three millions of dollars per year the loss to those cities between which said competitive traffic has heretofore been carried will, it is believed, be far greater. Petitioner fears that the sudden withdrawal of railroad competition from all of the large commercial cities of the South will have a disastrous effect upon the commerce of that section, if not upon the commerce of the whole country.

All of the railroad companies north of the Ohio river have notified petitioner in effect that they will, on April 5, withdraw all through rates from petitioner's lines unless petitioner will agree to reduce its local to its competitive rates. Petitioner is, therefore, compelled to apply to this honorable Commission to be relieved from the operation of the fourth section of the Act of Congress entitled "An Act to Regulate Commerce," so far as the same relates to the transportation of property between competitive points.

The premises considered, petitioner prays to be relieved from the operation of said section of said Act by this Commission, and to be authorized to charge less for longer than for shorter distances for the transportation of property from Cincinnati, Ohio, and through Cincinnati, Ohio, from points beyond, to Frankfort, Ky.; Lexington, Ky.; Louisville, Ky.; Owensboro', Ky.; Henderson, Ky.; Evansville, Ind.; Shawneetown, Ill.; East St. Louis, Ill.; St. Louis, Mo.; Nashville, Tenn.; Clarksville, Tenn.; Memphis, Tenn.; Birmingham, Ala.; Montgomery, Ala.; Selma, Ala.; Mobile, Ala.; Pensacola, Fla.; New Orleans, La.; and from Newport, Ky., to Evansville, Ind.; Shawneetown, Ill.; East St. Louis, Ill.; St. Louis, Mo.; Nashville, Tenn.; Clarksville, Tenn.; Birmingham, Ala.; Montgomery, Ala.; Selma, Ala.; Mobile, Ala.; Pensacola, Fla.; New Orleans, La.; and from Lexington, Ky., and through Lexington, Ky., from points beyond, to Cincinnati, Ohio; Evansville, Ind.; Shawneetown, Ill.; East St. Louis, Ill.; St. Louis, Mo.; Nashville, Tenn.; Clarks-

ville, Tenn.; Memphis, Tenn.; Birmingham, Ala.; Montgomery, Ala.; Selma, Ala.; Mobile, Ala.; Pensacola, Fla.; New Orleans, La., and from points beyond Lexington, not in the State of Kentucky, via Lexington, Ky., to Newport, Ky.; Frankfort, Ky.; Louisville, Ky.; Owensboro', Ky.; and Henderson, Ky.; and from Frankfort, Ky., to Cincinnati, Ohio; Evansville, Ind.; Shawneetown, Ill.; East St. Louis, Ill.; St. Louis, Mo.; Nashville, Tenn.; Clarksville, Tenn.; Memphis, Tenn.; Birmingham, Ala.; Montgomery, Ala.; Selma, Ala.; Mobile, Ala.; Pensacola, Fla.; New Orleans, La.; and from Louisville, Ky., and through Louisville, Ky., from points beyond, to Cincinnati, Ohio; Evansville, Ind.; Shawneetown, Ill.; East St. Louis, Ill.; St. Louis, Mo.; Nashville, Tenn.; Clarksville, Tenn.; Memphis, Tenn.; Birmingham, Ala.; Montgomery, Ala.; Selma, Ala.; Mobile, Ala.; Pensacola, Fla.; New Orleans, La.; and from points beyond Louisville, Ky., not in the State of Kentucky, via Louisville, Ky., to Newport, Ky.; Lexington, Ky.; Frankfort, Ky.; Owensboro', Ky.; Henderson, Ky.; and from Owensboro', Ky., and through Owensboro', Ky., from points beyond, to Cincinnati, Ohio; Evansville, Ind.; Shawneetown, Ill.; East St. Louis, Ill.; St. Louis, Mo.; Nashville, Tenn.; Clarksville, Tenn.; Memphis, Tenn.; Birmingham, Ala.; Montgomery, Ala.; Selma, Ala.; Mobile, Ala.; Pensacola, Fla.; New Orleans, La.; and from points beyond Owensboro', not in the State of Kentucky, via Owensboro', Ky., to Newport, Ky.; Frankfort, Ky.; Louisville, Ky.; Lexington, Ky., and Henderson, Ky.; and from Henderson, Ky., and through Henderson, Ky., from points beyond to Cincinnati, Ohio; Shawneetown, Ill.; East St. Louis, Ill.; St. Louis, Mo.; Nashville, Tenn.; Clarksville, Tenn.; Memphis, Tenn.; Birmingham, Ala.; Montgomery, Ala.; Selma, Ala.; Mobile, Ala.; Pensacola, Fla.; New Orleans, La.; and from points beyond Henderson, Ky., not in the State of Kentucky, via Henderson, Ky., to Newport, Ky.; Frankfort, Ky.; Louisville, Ky.; Lexington, Ky., and Owensboro', Ky.; and from Evansville, Ind., and through Evansville, Ind., from points beyond, to Cincinnati, Ohio; Newport, Ky.; Frankfort, Ky.; Louisville, Ky.; Lexington, Ky.; Owensboro', Ky.; Shawneetown, Ill.; East St. Louis,

Ill. ; St. Louis, Mo. ; Nashville, Tenn. ; Clarksville, Tenn. ; Memphis, Tenn. ; Birmingham, Ala. ; Montgomery, Ala. ; Selma, Ala. ; Mobile, Ala. ; Pensacola, Fla. ; New Orleans, La. ; and from Shawneetown, Ill., to Cincinnati, Ohio ; Newport, Ky. ; Frankfort, Ky. ; Louisville, Ky. ; Lexington, Ky. ; Owensboro', Ky. ; Henderson, Ky. ; Evansville, Ind. ; St. Louis, Mo. ; Nashville, Tenn. ; Clarksville, Tenn. ; Memphis, Tenn. ; Birmingham, Ala. ; Montgomery, Ala. ; Selma, Ala. ; Mobile, Ala. ; Pensacola, Fla. ; New Orleans, La. ; and from East St. Louis, Ill., and through East St. Louis, Ill., from points beyond, to Cincinnati, Ohio ; Newport, Ky. ; Frankfort, Ky. ; Louisville, Ky. ; Lexington, Ky. ; Owensboro', Ky. ; Henderson, Ky. ; Evansville, Ind. ; Nashville, Tenn. ; Clarksville, Tenn. ; Memphis, Tenn. ; Birmingham, Ala. ; Montgomery, Ala. ; Selma, Ala. ; Mobile, Ala. ; Pensacola, Fla. ; New Orleans, La. ; and from St. Louis, Mo., and through St. Louis, Mo., from points beyond, to Cincinnati, Ohio ; Newport, Ky. ; Frankfort, Ky. ; Louisville, Ky. ; Lexington, Ky. ; Owensboro', Ky. ; Henderson, Ky. ; Evansville, Ind. ; Shawneetown, Ill. ; Nashville, Tenn. ; Clarksville, Tenn. ; Memphis, Tenn. ; Birmingham, Ala. ; Montgomery, Ala. ; Selma, Ala. ; Mobile, Ala. ; Pensacola, Fla. ; New Orleans, La. ; and from Nashville, Tenn., and through Nashville, Tenn., from points beyond to Cincinnati, Ohio ; Newport, Ky. ; Frankfort, Ky. ; Louisville, Ky. ; Lexington, Ky. ; Owensboro', Ky. ; Henderson, Ky. ; Evansville, Ind. ; Shawneetown, Ill. ; East St. Louis, Ill. ; St. Louis, Mo. ; Birmingham, Ala. ; Montgomery, Ala. ; Selma, Ala. ; Mobile, Ala. ; Pensacola, Fla. ; and from points beyond Nashville not in the State of Tennessee via Nashville, Tenn., to Clarksville, Tenn., and Memphis, Tenn., and from Clarksville, Tenn., and through Clarksville, Tenn., from points beyond to Cincinnati, Ohio ; Newport, Ky. ; Frankfort, Ky. ; Louisville, Ky. ; Lexington, Ky. ; Owensboro', Ky. ; Henderson, Ky. ; Evansville, Ind. ; Shawneetown, Ill. ; East St. Louis, Ill. ; St. Louis, Mo. ; Birmingham, Ala. ; Montgomery, Ala. ; Selma, Ala. ; Mobile, Ala. ; Pensacola, Fla. ; New Orleans, La., and from points beyond Clarksville, Tenn., not in the State of Tennessee via Clarksville to Memphis, Tenn. ; and Nashville, Tenn. ; and

from Memphis, Tenn., and through Memphis, Tenn., from points beyond to Cincinnati, Ohio; Newport, Ky.; Frankfort, Ky.; Louisville, Ky.; Lexington, Ky.; Owensboro', Ky.; Henderson, Ky.; Evansville, Ind.; Shawneetown, Ill.; East St. Louis, Ill.; St. Louis, Mo.; Birmingham, Ala.; Montgomery, Ala.; Selma, Ala.; Mobile, Ala.; Pensacola, Fla.; New Orleans, La.; and from points beyond Memphis, Tenn., not in the State of Tennessee via Memphis, Tenn., to Clarksville, Tenn.; and Nashville, Tenn.; from Birmingham, Ala., and through Birmingham, Ala., from points beyond to Cincinnati, Ohio; Newport, Ky.; Frankfort, Ky.; Louisville, Ky.; Lexington, Ky.; Owensboro', Ky.; Henderson, Ky.; Evansville, Ind.; Shawneetown, Ill.; East St. Louis, Ill.; St. Louis, Mo.; Nashville, Tenn.; Clarksville, Tenn.; Pensacola, Fla.; New Orleans, La.; and from points beyond Birmingham, Ala., not in the State of Alabama, via Birmingham to Montgomery, Ala.; Selma, Ala.; Mobile, Ala.; and from Montgomery, Ala., and through Montgomery, Ala., from points beyond, to Cincinnati, Ohio; Newport, Ky.; Frankfort, Ky.; Louisville, Ky.; Lexington, Ky.; Owensboro', Ky.; Henderson, Ky.; Evansville, Ind.; Shawneetown, Ill.; East St. Louis, Ill.; St. Louis, Mo.; Nashville, Tenn.; Clarksville, Tenn.; Pensacola, Fla.; New Orleans, La.; and from points beyond Montgomery, Ala., not in the State of Alabama, via Montgomery, to Birmingham, Ala.; Selma, Ala., and Mobile, Ala.; and from Mobile, Ala., and through Mobile, Ala., from points beyond, to Cincinnati, Ohio; Newport, Ky.; Frankfort, Ky.; Louisville, Ky.; Lexington, Ky.; Owensboro', Ky.; Henderson, Ky.; Evansville, Ind.; Shawneetown, Ill.; East St. Louis, Ill.; St. Louis, Mo.; Nashville, Tenn.; Clarksville, Tenn.; Memphis, Tenn.; Pensacola, Fla.; New Orleans, La.; and from points beyond Mobile, Ala., not in the State of Alabama, via Mobile, to Montgomery, Ala.; Selma, Ala., and Birmingham, Ala.; and from Pensacola, Fla., and through Pensacola, Fla., from points beyond, to Cincinnati, Ohio; Newport, Ky.; Frankfort, Ky.; Louisville, Ky.; Owensboro', Ky.; Henderson, Ky.; Evansville, Ind.; Shawneetown, Ill.; East St. Louis, Ill.; St. Louis, Mo.; Nashville,

Tenn.; Clarksville, Tenn.; Memphis, Tenn.; Birmingham, Ala.; Montgomery, Ala.; Selma, Ala.; Mobile, Ala.; New Orleans, La.; and from New Orleans, La., and through New Orleans, La., from points beyond, to Cincinnati, Ohio; Newport, Ky.; Frankfort, Ky.; Louisville, Ky.; Lexington, Ky.; Owensboro', Ky.; Henderson, Ky.; Evansville, Ind.; Shawneetown, Ill.; East St. Louis, Ill.; St. Louis, Mo.; Nashville, Tenn.; Clarksville, Tenn.; Memphis, Tenn.; Birmingham, Ala.; Montgomery, Ala.; Selma, Ala.; Mobile, Ala.; Pensacola, Fla.; to an extent that will enable the Louisville and Nashville Railroad Company and connecting lines, to make such rates between the points of shipment and the points of destination on property that may be transported as competition may render necessary; and petitioner prays for all such other and further relief as it may be entitled to.

Similar petitions were presented by other companies, all of which were duly signed and verified, and the Commission after taking such evidence as was offered in support of their allegations, on April 6, 1887, made on said first-mentioned petition an order which, after reciting that the Association on behalf of the members composing it, and who were common carriers subject to the provisions of the Act to Regulate Commerce, had petitioned for authority to charge less for longer than for shorter distances in certain cases, that is to say, for the transportation of property from and to points mentioned by name in the order, to and from other points also mentioned, and from and to said last-named points each with the other so far as the same are situated in different States, at lower rates than are charged from and to the same points to and from local points intermediate the points last enumerated, over the same lines;

And that certain of said railroad companies, lines and systems had also severally made application for the like authority so far as said points are reached by them respectively;

And that said common-carriers had presented as a reason for granting their said applications the existence of water and other competition, claiming that the same cannot be met except by maintaining the rates heretofore established to and

from said points, which are alleged to be too low to enable said common-carriers to carry on business if applied to said local intermediate points; and further claiming that great disturbance of business will occur if present traffic arrangements and rates are immediately changed.

And that it appearing to the Commission, after investigation of said petitions and the facts presented in support thereof, to be a proper case for a temporary order authorizing existing rates to be maintained for the time being, until the Commission could make a complete examination of the matters alleged in said petition as reasons for relieving said common carriers from the operation of said section of said act;

It was thereupon "ordered that the said application be and the same hereby is granted temporarily, subject to modification or revocation by the Commission at any time upon hearing or otherwise; and the said common carriers are hereby temporarily relieved from the operation of the fourth section of said act to the extent specified in the recitals of this order, and for a period not greater than ninety days from this date; subject, however, to the restriction that none of said common carriers, while this order remains in force, shall in any case charge or receive compensation for the transportation of property between stations on their respective lines where more is charged for a shorter than for a longer haul, which shall be greater than the rates in force and charged and received by said carriers respectively on the 31st day of March, 1887, schedules of which have been filed with the Commission.

"It is made a further condition of this order that a printed copy hereof shall be forthwith publicly posted and kept with the schedule of rates, fares and charges at every station upon the lines of said common carriers where such schedule is by law required to be posted and kept, for the use of the public.

"And it is further ordered that the Commission convene at Atlanta, Georgia, on the 26th day of April, 1887, at 3 o'clock, P. M., and thereafter at Mobile, Alabama, on April 29th, at New Orleans, Louisiana, on May 2d, and at Mem-

phis, Tennessee, on May 4th, for the consideration of the subject matter of said petitions ; at which places and times said common carriers or any of them may appear and present applications for said relief, with evidence in support thereof ; which applications in each case must show the precise relief desired, the facts upon which the same is claimed, and the extent to which relief from the operation of said section of said act is asked for. And at the same places and times any persons interested in opposing any such application may also appear and be heard. And at any time prior to May 6, 1887, the Commission will receive printed or written communications in support of or in opposition to the relief asked by said petitions. This announcement respecting times and places of hearing, and method of procedure, is subject to change or enlargement in the discretion of the Commission."

As was contemplated by this order, the Commission convened at the City of Atlanta, April 27, 1887, and was met by a large number of parties who had come for the purpose of giving evidence or of presenting their views on the questions involved. On opening the session the chairman stated in general terms the occasion for holding it ; that the Commission had received quite a number of petitions from railroad companies whose field of operations was in that section of the country, asking that there be made in their behalf exceptional orders under the fourth section of the Act to Regulate Commerce. The Commission believed that these orders could only properly be made upon evidence, and after such investigation as made it plain that the cases were exceptional, and that the orders were demanded by a proper regard for the interest of the petitioners, and were not inconsistent with the public interest. At the outset it should be understood that the wisdom, the justice or the propriety of the legislation under which the Commission was convened, or of any provision thereof was not in question, and not open to evidence or discussion. All that had been settled in the enactment of the law, and the Commission as well as the petitioners and all other persons must accept the legislative conclusion as final. Evidence, therefore, which only tended to show that

the law operated severely upon a petitioner or upon any interest, town or section would be impertinent, unless it went to the extent of showing that the ill effects complained of were not general, but were so far special, peculiar and exceptional as to call for an order of special relief in favor of some particular carrier. With this statement of the proper scope of the investigation the Commission would proceed to the taking of such evidence as might be offered in support of the petitions, and would also give opportunity to parties who might think that their interests or the interests of the public required a denial of the prayer of the petitioners, to present evidence in support of their views. The evidence in general would be taken under oath, as upon judicial investigation, but documentary evidence of facts which could best be presented in that form would be taken, and also such memorials as might be offered from municipal and other public bodies. The petitions would not be taken up severally, but the evidence in support of them all would first be received, and afterwards the evidence of those who opposed them. This course of proceeding was adopted because it was believed that much of the evidence that would tend to support or to defeat any one petition would have a similar bearing upon the others, and that what was peculiar to any one petitioner might be taken on the general bearing without embarrassment or confusion.

After this preliminary statement the taking of evidence was proceeded with, the petitioners by counsel or by their officers questioning their witnesses, and those appearing to oppose the petitioners, cross-examining as they saw occasion. Several municipal bodies and commercial and industrial organizations also produced evidence in support of the petitions, and a number of witnesses appeared and gave testimony as representing merely themselves or some special business organization or interest. After the evidence in support of the petitions was all in, counter evidence was taken in the same way. The Commissioners in all cases as they saw occasion questioned the witnesses freely, not only upon what they had testified to, but also on such other matters as they seemed pertinent to the discussion. At the conclusion of the

evidence oral arguments in support of the petitions were made by Hon. W. S. Chisholm, Mr. J. F. Hanson and Mr. E. P. Alexander, and in opposition by Mr. D. P. Hill, and printed arguments were filed by others.

At Mobile the Commission convened April 29, 1887, and after preliminary statement as before, proceeded in like manner to take evidence. Here also a large amount of evidence was taken. At New Orleans, May 2, like proceedings were had. Among the witnesses there presenting himself to support the petitions, but without being summoned by the petitioners, was Mr. H. C. Waite, who commenced reading a paper, and after proceeding for a time, was interrupted with the inquiry by the chairman, whether his statement was not intended as an argument against the law. He replied that it was. The following proceeding then took place :

The Chairman : We are not here to question the legislation. The propriety and justice of the law have been settled. If you have any facts to show, that constitute special and exceptional reasons why an order should be made exempting any of these petitioners, or any part of any of their lines from a strict application of the law—which in itself we receive as just and proper—you may present those facts, and we shall be glad to receive them ; but the argument you present is entirely out of place when offered to us. It might be in place before Congress, but certainly not here. As we have followed your argument, you advance nothing that tends to show that any one of the petitioners before us occupies any exceptional position whatever ; but simply that the law, as it stands, is wrong, impolitic, unwise. With that we have nothing to do. We have no power to question the propriety or the justice of the law ; none whatever.

The Witness : I do not appear for these petitioners, but on my own behalf.

The Chairman : Very well ; upon any petition before us that presents for our consideration any matter within our jurisdiction, we should be glad to take your evidence ; but in your paper so far you show nothing of the kind. You simply show, or endeavor to show, that the law is an unwise law. We cannot listen to that.

The Witness : Permit me to say that my idea was to show that the enforcement of the law was unwise, and that it should be suspended under the discretionary power which I understand the Commission holds.

The Chairman : We have no such discretionary power whatever; to suspend this law or any other law. This law provides that in exceptional cases we may make an order, but the question is whether an exceptional case is shown. The petitioners before us think that by their petitions they have shown such a case, and we are ready to hear your evidence, or the evidence of any other person tending to show the exception; but you produce nothing so far, in argument or otherwise, that tends to show an exception. On the other hand all that you show tends to support the proposition that the law is in itself unwise. We have no business to assume that, and we do not expect to assume it under any circumstances.

The Witness : I do not wish to criticise anything in connection with this law except so far as its enforcement is concerned. I had supposed that these discretionary powers resting in the Commission—

The Chairman : No, sir, we expect to enforce this law. It is a part of the law itself, however, that under certain circumstances we may make exceptions; but in order to entitle us to make the exceptions, there must be some showing, first by petition and then by evidence, that the exceptional case does exist. Your argument so far does not tend to show that, at all; but on the other hand it tends to show that universally the law is unjust. That is all out of place here.

The Witness : Is the objection taken to the form in which I appear?

The Chairman : The objection is to the whole substance of your argument, as being something outside of our jurisdiction; something that should be addressed to the legislative authority, not to the administrative or judicial. At the opening of the session, in order that there might be no misapprehension on this point, it was distinctly stated that the authority of the Commission was very limited, and did not extend to a general suspension of the law at all, but only to the consideration of special and exceptional cases.

At Memphis further proceedings of a like nature were had on May 4, 1887, and all the evidence offered was taken; after which the Commission returned to Washington. While sessions were thus being held the Commission had occasion to consider the question whether towns or commercial or other organizations might not petition for suspensions under the fourth section of the Act, where the railroad companies had not applied on their own behalf, and decided that it had no power to receive such petitions. If the railroad companies could and did comply with the law literally, the Commission was not at liberty to consider whether they might with propriety and justice do otherwise.

After its return to Washington the Commission took further testimony from time to time as it was offered.

E. Baxter, general counsel for the Louisville & Nashville Railroad Company, filed an elaborate printed argument in support of its petition, as did also *Mr. E. B. Stahlman*, one of its officers.

June 15, 1887, the following opinion was filed and ordered entered thereon.

COOLEY, *Chairman*:

The Louisville and Nashville Railroad Company was one of the first to apply for relief under the fourth section of the Act to Regulate Commerce, which, after declaring the general rule that more shall not be charged or received in the aggregate by a common carrier subject to the law, for the transportation of passengers or of the like kind of property, under substantially similar circumstances and conditions for a shorter than for a longer distance over the same line in the same direction, the shorter being included in the longer, proceeds then to authorize exceptions, and confers upon the Commission certain powers in respect thereto.

From the first there have been two opinions regarding the proper construction of this provision for exceptions; one view being that no exception can be lawful unless made with the sanction of the Commission; and the other, apparently better supported on the words of the statute, that an order of re-

lief is not required when the circumstances and conditions are substantially dissimilar, since the carrier, in acting upon them would commit no breach of law, though it would be responsible in case it were found that the circumstances and conditions were misconceived or misjudged. Under this last view the order for relief would be needful only when the case was not one of plainly dissimilar circumstances and conditions, but in which, nevertheless, there might be reasons and equities that would sanction such greater charge.

The Commission is informed that the inter-state roads north of the Potomac and the Ohio, and east of the Missouri, with substantial unanimity, have conformed to the requirements of the fourth section by putting in force tariffs rearranged accordingly. Some friction was manifested for a time, arising largely from the discontinuance of special rates, favors, and privileges, and from the adoption of new classifications; but where the fourth section has been thus made operative very few instances have come to our attention of injury thereby occasioned.

The roads which anticipated special injury to commerce from the strict enforcement of the law were principally those situated in the Southern States and the transcontinental lines. After a little time some of the north and south roads in the territory first mentioned found themselves excluded to a certain extent from business which they had previously handled, but these instances were not numerous, so far as the Commission is at present advised.

In the cases where loss of revenue to the roads and injury to the business of the country was most seriously anticipated, the railroad companies, although some of them took the ground that the statute contemplated they would determine for themselves the exceptional cases in which they might make a lower charge for a longer haul, nevertheless were unwilling to incur the peril of so arranging their tariffs that they would in any instance conflict with the general rule which the act prescribed, apparently deeming it more prudent to suffer temporary loss of traffic until the act could receive authoritative construction than to subject themselves to heavy penalties in case it should finally be held that the gen-

eral rule must be applied in every case until the authority of the Commission for making exceptions has been given. The Louisville and Nashville Company was one of those which took this position, and upon its application a temporary order of relief was made. Following the making of that and of other like orders, the Commission proceeded to take a great amount of testimony bearing upon the question whether the several carriers relieved were warranted in making rates on their lines which were not in conformity to the statutory rule, and in doing so it invited light from all sources, and was glad to have the assistance, not only of the railroad companies, but of competing steamboat owners, of boards of trade, and of citizens generally, whatever might be their line of business. The fullest opportunity has been afforded to any citizen of the United States who desired to be heard upon the matter, to present facts personally or by affidavit, and arguments *viva voce*, in writing, or in print. The invitation has been quite largely accepted; the subject has been laid fully before us, and we have endeavored to give to it the consideration its importance demands.

In making the orders of temporary relief no opinion was expressed upon the question whether they were necessary for the protection of the carriers in case the circumstances and conditions were found to be in fact dissimilar. The railroad companies did not raise that question, but, as has been said, elected as a matter of prudence to apply for the preliminary order. No objection could well be taken to this course provided it should prove to be practicable for the Commission to take up and in a reasonable time dispose of the several applications made to it; but it was almost immediately perceived that the number was to be so great that this would be quite out of the question. Each order for relief would necessarily be preceded by investigation into the facts, on evidence which in most cases would be best obtained along the line of the road itself. A single case might therefore require for its proper determination the taking of evidence all the way from the Pacific to the Atlantic, and this not merely the evidence of witnesses for the petitioning carrier, but of such other parties as might conceive that their

interests or the interests of the public would be subserved either by granting the relief applied for or by denying it.

If the Commission were to give to the petitions the time needed for their proper determination, it would be compelled to forego the performance of judicial and other functions which by the statute were apparently assumed to be of high importance, and even then its authority to grant relief would be performed under such circumstances of embarrassment and delay that it must in large measure fail to accomplish the beneficial purposes which we must suppose the statute had in view.

Assuming—as we must when the law provides for it—that it is important to the public interest that a privilege to charge more for the shorter haul than for the longer over the same line in the same direction, should be admitted in some cases, as had been the custom, the interruption of the privilege when the case was proper for it would presumptively cause mischief, and should not therefore be compulsory while the slow processes of an investigation were going on, especially as the particular investigation might itself be compelled to await the determination of many others. Moreover, an adjudication upon a petition for relief would in many cases be far from concluding the labors of the Commission in respect to the equities involved, for questions of rates assume new forms, and may require to be met differently from day to day; and in those sections of the country in which the reasons or supposed reasons for exceptional rates are most prevalent, the Commission would, in effect, be required to act as rate makers for all the roads, and compelled to adjust the tariffs so as to meet the exigencies of business, while at the same time endeavoring to protect relative rights and equities of rival carriers and rival localities. This in any considerable State would be an enormous task. In a country so large as ours, and with so vast a mileage of roads, it would be superhuman. A construction of the statute which should require its performance would render the due administration of the law altogether impracticable, and that fact tends strongly to show that such a construction could not have been intended.

We have listened, with an earnest desire to reach a just conclusion, to all the arguments presented on the construction of the statute, by those appearing either to advocate or to oppose the applications, and after mature consideration we are satisfied that the statute does not require that the Commission shall prescribe in every instance the exceptional case, and grant its order for relief before the carrier is at liberty in its tariffs to depart from the general rule. The terms of the statute clearly lead to the opposite conclusion. It declares :

“It shall be unlawful for any common carrier subject to the provisions of this Act to charge or receive any greater compensation in the aggregate for the transportation of passengers or of the like kind of property under substantially similar circumstances and conditions for a shorter than for a longer distance over the same line in the same direction, the shorter being included in the longer distance.”

Here we have clearly stated what is unlawful and forbidden ; and for doing the unlawful and forbidden act penalties are then provided. But that which the Act does not declare unlawful must remain lawful if it was so before, and that which it fails to forbid the carrier is left at liberty to do without permission of any one. The charging or receiving the greater compensation for the shorter than for the longer haul is seen to be forbidden only when both are under substantially similar circumstances and conditions ; and, therefore, if in any case the carrier, without first obtaining an order of relief, shall depart from the general rule, its doing so will not alone convict it of illegality, since if the circumstances and conditions of the two hauls are dissimilar the statute is not violated. Should an interested party dispute that the action of the carrier was warranted, an issue would be presented for adjudication, and the risks of that adjudication the carrier would necessarily assume. The later clause in the same section, which empowers the Commission to make orders for relief in its discretion, does not in doing so restrict it to a finding of circumstances and conditions strictly dissimilar, but seems intended to give a discretionary authority for cases that could not well be indicated in advance by

general designation, while the cases which upon their facts should be acted upon as clearly exceptional would be left for adjudication when the action of the carrier was challenged. The statute becomes on this construction practical, and this section may be enforced without serious embarrassment.

From the recital of the history of the framing of this section (which is given further on) it appears among other things that the proviso respecting orders for relief was devised by the Senate Committee which originally drafted the section, and that it was an essential part of it as first proposed; the prohibitory part of the section being then quite stringent, but a discretion being conferred upon the Commission to relieve against its operation. Afterwards the words "under substantially similar circumstances and conditions" were inserted in the first sentence of the section. The proviso was perfectly intelligible so long as the leading clause contained a hard and fast rule against charging more for the shorter than for the longer haul. It was then obvious that a discretion was left to the Commission in the matter of relaxing the rule when different circumstances and conditions rendered such relaxation in its judgment proper. Had the section passed as it then stood, the exercise of such a discretion might have been entered upon by the Commission with a distinct understanding of the task imposed, even though its adequate performance might have been out of the question; but modified as it now stands, the necessity for a relieving order is greatly narrowed, it being obvious that no order is needed to relieve against the operation of the statute when nothing is done or proposed which it makes unlawful.

If any serious doubt of the proper construction of the clause of the statute now under review should, after careful consideration of its terms, still remain, it would seem that it must be removed when section 2, in which the same controlling words are made use of, is examined in connection. That section provides:

"That if any common carrier subject to the provisions of this act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or

receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property subject to the provisions of this Act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful."

Here it will be observed that the phrase is precisely the same ; and there can be no doubt that the words were carefully chosen, probably because they were believed to express more accurately and precisely than would any others the exact thought which was in the legislative mind. And in this section, as well as in section 4, the phrase is employed to mark the limit of the carrier's privilege ; its privilege, too, in respect to the very subject-matter with which section 4, where it is employed, has to do, namely, the charges for transportation service. It is not at all likely that Congress would deliberately, in the same act and when dealing with the same general subject, make use of a phrase which was not only carefully chosen and peculiar, but also controlling, in such different senses that its effect as used in one place upon the conduct of the parties who were to be regulated and controlled by it, would be essentially different from what it was as used in another. But beyond question the carrier must judge for itself what are the "substantially similar circumstances and conditions" which preclude the special rate, rebate, or drawback, which is made unlawful by the second section, since no tribunal is empowered to judge for it until after the carrier has acted, and then only for the purpose of determining whether its action constitutes a violation of law. The carrier judges on peril of the consequences ; but the special rate, rebate or drawback which it grants is not illegal when it turns out that the circumstances and conditions were not such as to forbid it ; and as Congress clearly intended this, it must also, when using the same words in the fourth section,

have intended that the carrier whose privilege was in the same way limited by them, should in the same way act upon its judgment of the limiting circumstances and conditions.

Most of the applications made to the Commission for relief may be said to be based upon a showing of dissimilar circumstances and conditions claimed to justify the larger charge for the shorter haul. The Commission was asked to find that such dissimilar circumstances and conditions existed; and the question was presented in a great variety of forms. Upon this question it was believed that investigation into the conditions of railroad service in the States south of the Ohio and east of the Mississippi would be particularly useful. In the system of rate-making practiced in that section, the making of a greater charge on interstate business to and from intermediate stations than to and from competitive points requiring a longer haul had been, it appears, substantially universal, and business men in the larger towns united with the carriers in asserting that the cessation of the practice would force a stoppage of trade to an extent that would be destructive of many considerable interests. That section, therefore, seemed to afford a proper field for an inquiry into the reasons supposed to justify the practice. When the investigation was concluded the reasons which had been advanced appeared to be substantially the following:

That the support and maintenance of a railroad ought properly to be borne by the local traffic, for which it is supposed to be built, and the through traffic may justly be carried for any sum not below the actual cost of its own transportation.

That the cost of local traffic is greatest, and the charges for carrying it should be in proportion, and if they are so they will often result in the greater charge for the shorter haul.

That traffic carried long distances will much of it become impossible if charged rates corresponding to those which may properly be imposed on local traffic; and it must therefore be taken in recognition of the principle, accepted the world over, that traffic must be charged only what it will bear.

That the long hauls at low rates tend to build up manufactures and other industries without injury to the traffic upon which the rates are heaviest.

That charges on long hauls, which are less than the charges on shorter hauls over the same line in the same direction, are commonly charges which the carriers do not voluntarily fix, but which are forced upon them by a competition from whose compulsion there is practically no escape.

On some one or more of these reasons each of the applications was planted.

On the construction which we give to the statute these several applications need not have been filed, and therefore they might now be withdrawn without further judgment. But though the carrier might have acted on the judgment of its managers, it would have been at the peril of the consequences; and as it elected not to assume the responsibility, but to apply to the Commission for a relieving order, it may be proper to consider the application on its merits, especially as the question, what is a case of dissimilar circumstances and conditions within the meaning of the law, must in general be a mixed question of law and fact, upon which differences of opinion would be expected to arise. It is manifestly important to the public interest, as well as to that of the railroads themselves, that mistakes shall as far as possible be avoided. It is also important that the general rule laid down by the statute be strictly complied with whenever compliance appears to be fairly practicable, and that carriers direct their attention more to the feasibility of coming into conformity with it, than to the possibility of finding reasons upon which to ground exceptions. They are therefore entitled to the benefit of such conclusions as we have already reached upon the general merits of their applications, that they may be guided thereby in the preparation of their tariffs respectively. In giving these conclusions we limit ourselves strictly to the cases presented, and leave out of view such other grounds of relief, if any, as are not yet formally brought forward.

I. The fact that the shorter haul is of local traffic and the longer is not we cannot accept as making out a case of dissimilar circumstances and conditions within the meaning of

the statute. The claim to that effect which was advanced in support of one of the applications rests upon a theory that railroads are constructed for the special accommodation of the traffic along their lines respectively, and that consequently that traffic may be relied upon for their support, and may fairly be charged with all the items of cost and maintenance. Traffic originating at a distance and taken over the line may on this theory be justly transported at any rates the carrier may consent to accept, not below the actual cost of movement, and the local shippers are not in position to complain that such rates, as compared with what they must pay, seem to discriminate unjustly. But this theory has very little foundation in fact. It is not true, as a general rule, that railroads are constructed in exclusive reliance upon local traffic: on the contrary, through traffic is also contemplated, and is sometimes expected to yield returns even greater than that which the local traffic is likely to give. And whenever a road is constructed with special regard to local traffic, it is very likely to be the case that the local communities take upon themselves especial burdens in aid of the construction. When they do so they may justly claim that their traffic should be favored if discrimination of any sort is to be admitted. There are cases also in which roads have been constructed with special regard to long-haul traffic, some of them with the aid of Government grants; and in such cases the theory lacks all plausibility. Indeed it may be said to become plausible in any case only when, after a road has been constructed, some new and unanticipated business is offered it for long haul, but at rates relatively lower than the local traffic is charged. It may be neither unreasonable nor unjust to accept the lower rates for the long haul traffic in some cases on grounds stated further on; but it will not be because of any such inherent difference between long and short haul traffic as can make the latter chargeable with heavier burdens.

II. That the cost to the carrier of handling and transporting local traffic is greater than that of traffic carried long distances is a fact which may with greater reason, when the difference is considerable and clearly shown, be claimed to make out a case of dissimilar circumstances and conditions

under the statute. Cost of the service is always an important element in the fixing of rates ; and the evidence taken by the Commission tends to show—what indeed is well known and understood—that in proportion to amount and to the distance it is transported, the cost of the local traffic to the carrier is considerably the greater. This fact fairly establishes in favor of the carrier an equity entitling it to make for the more onerous service a greater proportionate charge. But it does not follow that the difference may be so great as to make the case an exception to the general rule the statute has prescribed. It is obvious that the statute intends that the greater charge for the shorter haul shall only be made in cases which on their facts are exceptional ; and when the carrier shows the general fact that the local traffic is most expensive, he thereby proves, not the exception, but the rule. To establish the exception, it would be necessary to go further and make proof that in the case of the particular traffic the difference in cost would be exceptionally great. Such cases sometimes arise. They occur on water as well as on land, and vessel owners on the rivers make the greater charge for the shorter haul in the same direction in many cases, defending their doing so with good reason on this very ground of greater cost, in making landings, etc. The carriers by land may sometimes justify the like charges with equal reason.

There is in the case, however, an inherent difficulty of no small moment. While cost, as has been said, is an element to be taken into account in the fixing of rates, and one of the very highest importance, it cannot, for reasons well understood, be made the sole basis, but it must in any case be used with caution and reserve. This is not merely because the word “cost” is made use of in different senses when applied to railroad traffic ; it being often used to cover merely the expense of loading, moving, and unloading trains ; but also because, in whatever sense the word may be used, it is quite impossible to apportion with accuracy the cost of service among the items of traffic. First of all when it is undertaken there must be an apportionment between the passenger traffic and the freight traffic ; and if we suppose this to be made

with reasonable accuracy, there must then be a like apportionment between the different kinds and classes of freight. Freight comes to a road in infinite variety; some heavy, some light, some in large packages, some in small; some perishable or of special value, and requiring peculiar accommodations and care; it is picked up in varying quantities at numerous stations, to be carried differing distances, sometimes on fast trains and sometimes on slow; the service is performed by men whose compensation differs, but the most of whom have something to do with all branches of the traffic, so that all assist in carrying it on over a road and by means of buildings, appliances, and equipment which have been provided for the whole. Any attempt to apportion the cost therefore would at the best, and under the most favorable circumstances only reach an approximation. This is so well understood the world over that the propositions which from time to time have been made in other countries to measure the charges of the carrier by the cost of the carriage solely, have always been abandoned after investigation.

We may well believe, therefore, that the statute, in its provision against the greater charge for the shorter haul, did not intend that a difference in cost which is practically universal, and could not possibly be arrived at with accuracy, should as a general fact be a governing consideration, to the extent that would support the greater charge for the shorter haul in the cases in which such greater charge was in general prohibited. Where there are no circumstances to make the short haul exceptionally expensive to the carrier, or the long haul relatively inexpensive, a difference in rates which reason and fairness will justify may still be made within the limitation of the statute; but to make out the exceptional case, in which the general rule of the statute may be disregarded on the ground that the circumstances and conditions are not substantially similar, the difference in cost should itself be exceptional, and be capable of proof amounting to practical demonstration.

In support of one of the applications presented to us the carrier was able to make a showing of lower cost on long-haul freight more clear and distinct than is commonly possi-

ble. The showing was that the through business on its 450 miles of road was transacted by different trains from the local ; that these moved much more rapidly and carried vastly the most freight to the train ; that the number of men required was much less in proportion, not only upon the trains, but for the station and terminal service, and consequently all the items of expense were much smaller. These facts, which were apparent to the customers of the road, together with the peculiarly effective water competition, which affected principally the through traffic, influenced intelligent men doing business at local stations to admit, in giving evidence, that it might be just, and even necessary in some cases, that the charge for the shorter haul should be the greater. The disproportion, it was insisted, had been too great ; but when the question is one of degree, regulation rather than prohibition must be admitted to be the appropriate remedy ; and the carrier must keep in mind that if the right be established in any case to make the greater charge for the shorter haul, it is not a right to make a charge not just or reasonable in itself, or one which will work unjust preference between individuals, localities, or commodities. It is, on the other hand, a right grounded in justice, and must be so exercised that the result shall be equitable.

III. We have next the case of dissimilar circumstances and conditions supposed to be made out by a showing that property now transported long distances at very low rates could not be transported at all unless concession in rates were made to it. This is a common fact in railroad transportation ; the cases are to be met with in the traffic of all the long lines. The necessity for making concessions to long-haul traffic in the case of articles whose value in proportion to bulk or weight is small, and especially in that of the necessities of life, which are handled in large quantities, and in the supply of which the most distant countries compete, has long been conceded wherever railroads exist. The household goods of immigrants to the West have been carried for them at very low rates, and the results of their agriculture have afterwards been taken for seaboard and European markets in recognition of the general principle that the traf-

fic must not be charged rates beyond what it can bear. This is a just and sound principle when justly applied; and the country may be said not only to have acquiesced in its recognition, but to have desired and urged its application in a great variety of cases. Any suggestion that it was meant by the statute to abrogate it would scarcely be plausible, especially since, when not misapplied, it can harm no one, but may be, and often is, of great and manifest advantage, in enabling distant sections of the country to come into closer commercial relations, and to exchange to their mutual benefit their dissimilar productions, or to compete with each other in those which are similar.

But the cases must be very rare in which the larger charge in the aggregate for the shorter haul of the same kind of property over the same line in the same direction could be justified, when no other reason supported it than the fact that the traffic for the longer haul would bear no more. Manifestly such a discrimination when not imperative on other grounds is unjust; and the injustice becomes oppression when the effect is to increase the burden upon the traffic which has the shorter haul. There is a plain limit to the application of the principle that property is to be carried at rates it will bear; and the limit is reached when the rates charged are so low that further reduction would necessitate an increase of the charges upon other traffic in order to make up to the carrier such loss as the reduction causes. If some common vegetable, worth but five cents a hundred pounds more at a market a thousand miles distant than it is where it is grown, were to be transported that distance for the sum named, the producer nearer the market, if subjected to a higher charge, would have a right to complain that not only did the discrimination reduce the market value of his produce, but that the acceptance of the unreasonably low rates from the distant producer had a tendency to increase the charge for the shorter haul, so as to make it not only relatively, but, when considered by itself, unreasonably high.

It is a matter of public notoriety that a belief has prevailed to a considerable extent that long haul traffic was in many cases carried at a loss; that the carriers were enabled

to take it by making the charges for short haul traffic greater than would otherwise be necessary or reasonable, and that this constituted an abuse that ought to be corrected by law. Persons who did not hold to this belief have, on the other hand, taken low charges on long haul traffic as a proper measure for all charges, and have insisted that if the railroads could accept the low charges for one class of business they could and ought to do so for all classes. And this, as a rule, would be quite true if the railroads had it in their power to make the rates for all; which, however, is far from being the fact. There are many cases in which they have the option only to take the traffic at rates prescribed by the owners, or not to take it at all. But in respect to such cases we must repeat, by way of emphasis, that a successful appeal cannot be made to the equity of the statute on the mere ground that long-haul traffic will not bear higher rates, if in fact those it can bear, if accepted, will cause a loss to the carrier which must be made up on short-haul traffic. To have one's property carried at a loss would not be matter of right, but of favor; and favors in transportation are not to be granted to any one class at the expense of any other.

IV. The greater charge for the shorter haul has been in some cases defended, on the ground that manufactures and other industries were thereby favored and built up. But a question likely to arise in such cases is whether that which is done for some is not at the expense or to the unjust prejudice of others. The statutes of some of the Southern States seek to encourage manufactures by permitting special rates to be made in their favor; and railroad companies, in some cases which were brought to our notice, have entered into contracts with parties proposing to establish large manufactories, or otherwise to engage extensively in business, whereby, in consideration of the investment of some named sum in the proposed enterprise, they agree that favorable rates, which are specified, shall be given on its traffic for a term of years. The purpose of such laws and such contracts is, no doubt, commendable; but the practical difficulty of giving them effect without prejudice to the interests of others is always found to be serious. Very often they tend to the benefit of

large establishments and to the prejudice of small. Manufactures are infinite in variety and extent; and, while it might be easy for those whose transactions were large to obtain the benefit of an impartial law made for the encouragement of all, the small establishments, sending out their goods in small lots and irregularly, might find the law practically of little or no value. The railroad companies, not unwilling to make long-time contracts for rates which contemplate a large business, would scarcely be expected to stipulate for them with the small establishments, which exist in variety in every town and hamlet.

As a matter of fact the laws and the contracts which are made for the benefit of manufactures usually contemplate not all kinds of manufactures, but only those leading and most prominent kinds which require large capital, and whose operations are on an extensive scale. Encouragement to these is of public advantage when it wrongs no one; but it is just as much the duty of the common carrier in making its low rates on long hauls to consider whom they may ruin as whom they may build up; and while the carrier cannot be held responsible for the consequences which flow legitimately from tariffs impartially arranged, it cannot justify on the ground of public benefit the unequal rates which, however beneficial to some, may be equally mischievous to others. A great establishment, strengthened by the favor of public carriers until it acquires the power to crush competition, and actually exercises that power, may by that very fact become an enemy to the civil State; and no benefit it can give to the public, in the low prices of its commodities or otherwise, can compensate for the general sense of wrong which those must feel who are injured by it, or for the sentiment which grows up in view of its operations, that the law fails to give the equality of right and privilege which it nominally promises. That some such great establishments have been fostered by the aid of the railroad companies is commonly believed; and provisions against unjust discriminations in this statute had for their object, among other things, to bring this mischief to an end. The plausible excuse of public benefit, if it ever had force in such cases, has none

now, for the statute forbids what public sentiment had already condemned.

It was shown by the evidence that the rates upon long hauls were such as would admit of the pine lumber of Mississippi being sold in Wisconsin in competition with lumber there cut, and of the iron of Alabama being carried through Pittsburgh to Eastern manufactories. If the lines originating in Wisconsin and Pennsylvania give to the producers of those States corresponding rates for the traffic in the other direction under similar circumstances, this will prejudice no one ; but, on the contrary, may operate to the public advantage, provided always that the rates actually charged are compensatory. The petitioner in this case claims that in no case does it carry such long-haul traffic at rates which fall below cost. By this, however, is meant only the cost of movement of the particular traffic, leaving out of view the fixed charges of the road, which must, in any event, be provided for, whether the long-haul traffic is or is not taken. This distinction between the cost of movement and the fixed charges often becomes of importance in such cases as that of the lumber trade just mentioned. That trade is new ; the roads which take it were built without anticipating its springing up, and their managers made their calculations for business to meet the whole cost of operation in reliance upon such traffic as was then apparent or probable. The fixed charges of the road may, for purposes of illustration, be assumed to equal one-half of the whole, the cost of movement of freight the other half. The rates laid were doubtless calculated to cover the whole, with a margin for profit, and were so laid that all traffic would contribute towards both fixed charges and cost of movement. But now comes this new business, and from the nature of the case low rates are a necessity to it ; it can pay perhaps little if anything more than half what is paid by other traffic. But taking it will not increase perceptibly the fixed charges of the road, because those are made up of items that must be paid whether the traffic is large or small. What is added to the cost by taking it is simply the expense of its own handling and movement ; and upon the supposition made, there might per-

haps be gain to the road instead of loss in taking it at anything above half the rates which are levied upon other traffic corresponding to it in classification. It might therefore be carried at such rates without wrong to any one. But if it were carried at lower rates still, not only would the other traffic be left to pay the fixed charges and the cost of its own movement, but it would also, to some extent, be burdened with the cost of movement of the long-haul traffic thus added to the business of the road.

The injustice of this would be very apparent, and it would become intolerable if some portion of the short-haul traffic was competitive to the long-haul traffic, and was so heavily taxed by higher rates as to make continuance impossible. It is very plain that an unrestricted power to make such rates is liable to infinite abuses, and that it may as easily be made use of to injure one enterprise as to build up another. In the earnest and sometimes unreasoning rivalry of railroad companies, it has no doubt often been employed as much to give mere volume to business as for any anticipated net revenue; and the wrongs have in such cases far exceeded any possible advantages that could accrue either to the roads themselves or to the public. It cannot be supposed that in any case the true interest of a road will be prejudiced by its being held strictly to the rule that excessively low rates on some traffic are not to be compensated for by excessively high rates on other traffic. And if rates are so graded as to violate the statutory general rule, it cannot be accepted as justification for the higher rates on the shorter haul that the lower rates on the longer haul had encouragement to manufactures or other industries for their motive.

V. The chief ground on which the applicants pressed for relief from the long and short haul clause of the statute, was that competition forced the railroad companies to make rates to and from competitive points to the level of which it was not possible to bring the charges at non-competitive points, because the doing so would cause such reduction of revenues as would force roads into bankruptcy and ultimately into suspension. It was, therefore, as was said, inevitable that in a great number of cases the greater charge should be

made for the shorter haul ; and nothing but putting a stop to competition by law would prevent it. This it was insisted the new law does not attempt or intend. On the contrary the importance of competition, in fostering and regulating the internal commerce among the States, is clearly noted. In the sixth section carriers are permitted to reduce their rates at any time, but are forbidden to raise them except after giving ten days' notice. In the fifth section the pooling of freight is forbidden, unquestionably because the practice was regarded as having a tendency to prevent or check competition. The act studiously omits to bring the steamboats and other independent water lines within its control, and must, therefore, have contemplated the continuance not only of competition, but of those things which competition renders inevitable. The existence of competitive forces to an extent that the railroad companies at competitive points are unable to control, it was therefore argued, would make out a case of circumstances and conditions so dissimilar to those prevailing at non-competitive points as might justify the making of the greater charge for the shorter haul which was in general prohibited.

The competition which was brought to our attention as having this imperative force was, *first*, the competition of railroads with water-ways ; *second*, the competition of railroads with other railroads which are not subject to the provisions of the "Act to Regulate Commerce" ; *third*, the competition with each other of railroads which are subject to that act ; *fourth*, the competition of business or trade centres with each other, operating indirectly upon the roads which form their channels of trade ; and, *fifth*, the competition of business interests in like manner operating upon the roads by whose assistance the business is carried on.

This fifth species of competition has already been remarked upon to some extent, and it has been seen that it will not justify a railroad company in discriminating between its own customers to an extent that would create an exception to the general rule the statute prescribes. We pass it now without further remark. The others demand at our hands due consideration.

I. It was fairly shown before us that instances exist, and may be found along the routes of petitioner's lines in the States of Kentucky, Tennessee, Georgia, Alabama, Mississippi, and Louisiana, where the competition of water-ways forces down the railroad rates below what it is possible to make them at non-competitive points and still maintain the roads with success or efficiency. The reason is that the carriers by water can perform the service at very much less cost than the carriers by land.

The general fact is that railroad rates for the transportation of property must approximate closely those which are made between the same points by steamer, and the steamer rates are generally, if not invariably, much below what the railroads can afford to accept upon all their business. In such cases, if competition is maintained, more must be charged at interior points that can be obtained at the points of competition; and if the competitive rates are such as are productive of some gain, however slight, the non-competitive points are likely to receive indirect advantage therefrom, while the competitive points have the larger and more direct benefit, and are afforded a choice of agencies in transportation whose rivalry may fairly be expected to keep the cost down to a minimum. The interior points may have no ground for complaint in such a case, provided the rates they are charged are in themselves just and reasonable, even though the effect be that in some cases more is charged for the short than for the long haul over the same line in the same direction. This general fact is recognized the world over; and of English railways it has been often remarked that some of them would be deprived of much of their value if they were not allowed to meet water competition by such concessions at the points of contact as the competition would compel.

The only question that fairly arises in regard to it is whether the competition is kept within proper bounds. Vessel owners produced evidence before us to show that the railroads put down their rates to a ruinous point, in their determination to take the competitive traffic at all hazards, and eventually to crush out competition; and railroad managers

retorted with evidence that the blame for unremunerative rates was upon their rivals. But the question of relative fault is not important now. Low rates are a necessity of the situation; and if railroads compete with water transportation, either on the ocean or on the navigable rivers, they have no choice but to accept such rates. To compel the roads to observe strictly the general rule laid down by the fourth section would necessitate their abandonment of some classes of business in which their competition with water transportation is now of public importance. Vessel owners who appeared before us to oppose the applications made for relief, put their opposition in some cases explicitly on the ground that denying the applications would enable the vessel men to put up their own rates. This was to be expected, and is far from being blameworthy if in fact their business is not now reasonably profitable; but it is suggestive of the fact that the interest of the public and that of any class of public carriers is not in all respects identical.

It is more than probable that the complaints made by the vessel owners against certain of the railroads are to some extent well founded; that the railroads have not only made the rates at points of competition with vessels much too low in order that they might at all events obtain the business, but that this has been done in disregard alike of right and of true policy. This is only saying that in their wars of rates with vessel owners they have sometimes shown the same recklessness as in like wars among themselves; but the fact still remains that they must either be allowed to compete with vessel owners and make low charges for the purpose, or they must leave vessel owners in possession of the business without the check upon charges which competition would afford.

The question here is whether this limitation of competition was intended by the statute; or, on the other hand, did Congress intend that the existence of competition might in some cases make out the dissimilar circumstances and conditions which would support a greater charge for the shorter haul, even though it might be over the same line in the same direction, the shorter being included in the longer distance?

On this subject the history of the proceedings in Congress, which resulted in the adoption of the fourth section as it stands, is instructive; and with such brevity as is practicable it is recited here, not as determining conclusively the construction of the section, but as showing beyond question that the benefits of competition were meant to be retained, and that exceptions to the rigorous general rule were provided for to meet the contingencies which the competition might create.

In the report of the Senate select committee, submitted January 18, 1886, known as the Cullom report, is found the following language :

“No question connected with the problem of railroad regulation has given the committee more perplexity than that relating to the utility and expediency of legislation prohibiting a carrier from charging more for a shorter than a longer haul under any circumstances ; not that we have any doubt as to the injustice of such a charge under most circumstances, but because it seems inexpedient to enforce such a regulation under all circumstances.

“When the effect of the proposed prohibition is considered with reference to the whole internal commerce of the United States, and especially with reference to the necessity of preserving the prevailing cheap rates for long distance transportation, there is reason to fear that the result of rigidly enforcing the proposed regulation would be to stifle competition in numberless cases where it now exists, and is to the general public interest; and perhaps to deprive the country of the benefits of the low through rates now and for years given to and from the tide-water, without practical or appreciable advantage to intervening points.”

The bill introduced with the report contained the following provision upon this subject :

“SECTION 4. That it shall be unlawful for any common carrier subject to the provisions of this act, to charge or receive any greater compensation in the aggregate for the transportation of passengers or property for a shorter than for a longer distance over the same line in the same direction, and from the same original point of departure, if such greater charge for the shorter distance constitute an unjust discrimi-

nation ; but such greater charge for a shorter distance shall be presumptive evidence of unjust discrimination, which may, however, be rebutted by the common carrier.

“Upon application to the Commission appointed under the provisions of this Act, such common carriers may, in special cases, be authorized to charge less for longer than for shorter distances for the transportation of passengers or property ; and the Commission may from time to time make general rules covering exceptions to any such common carrier in cases where there is competition by river, sea, canal, or lake, exempting such designated common carrier from the operation of this section of this act ; and when such exceptions shall have been made and published, they shall have like force and effect as though the same had been specified in this section.”

Afterwards, and before debate, the committee, on February 16, 1886, reported as a substitute for this bill another, in which the following language is found :

“SEC. 4. That it shall be unlawful for any common carrier to charge or receive any greater compensation in the aggregate for the transportation of passengers or property subject to the provisions of this act, for a shorter than for a longer distance over the same line in the same direction, and from the same original point of departure ; provided, however, that upon application to the Commission,” etc. . . . [substantially as before].

The formal discussion of the measure was commenced April 14, 1886, the chairman of the select committee opening the debate by a speech in which he said concerning the fourth section :

“It is agreed that this is the principle that should be observed as a general rule. The committee found, however, that the principle was not of universal application ; that there were cases in which the railroads were compelled to make lower rates for longer than for shorter distances by the great law of competition, which is stronger than any law we can make, and that in some cases it would be a great hardship to the public as well as the railroads to rigidly enforce the general principle.”

It is perfectly clear that the intention of the original framers of the Senate bill was, to leave it to the discretion of the Commission, to exempt carriers from the operation of the rule in cases when the "great law of competition" made such a relaxation proper, having in view the interests of the carriers and the people.

On May 6, 1886, Senator Cullom moved to amend the section by striking out the words "covering exceptions to any such common carrier in cases when there is competition by river, sea, canal, or lake." He supported this motion by the suggestion that these words were not necessary, and that without them the Commission would have the same power and more. Senator Harris favored the amendment, as giving a broader discretion to the Commission, and it was adopted.

On May 12th, a motion was made by Senator Camden to change the phraseology of the first part of the section, so that it should read "of like kind of property under substantially similar circumstances and conditions." This amendment was agreed to as a substitute for a previous amendment proposed by Senator Camden, and with little additional debate.

The bill was finally passed on the part of the Senate, Section 4 remaining substantially as above, with the insertion of the following :

"But this shall not be construed as authorizing any common carrier within the terms of this Act, to charge and receive as great compensation for a shorter as for a longer distance."

The bill then went to the House of Representatives, and was referred to the Committee on Commerce. That committee reported as a substitute for it the bill before pending in the House, which contained the following provision upon the subject embraced in Section 4 of the Senate bill :

"That it shall be unlawful for any person or persons, engaged in the transportation of property as provided in the first section of this Act, to charge or receive any greater compensation for a similar amount and kind of property, for carrying, receiving, storing, forwarding, or hauling the same, for a shorter than for a longer distance, which includes the shorter distance, on any one railroad ; and the road of a cor-

poration shall include all the road in use by such corporation, whether owned or operated by it under a contract, agreement, or lease by such corporation."

In opening the debate on July 21, 1886, Mr. Reagan, chairman of the House Committee on Commerce, severely criticised the fourth section of the Senate bill, saying that the closing part of the section substantially nullified the former part, while his proposed substitute contained an absolute prohibition.

The minority of the committee, four in number, opposed the substitution, and in their report the following passage occurs :

"Nor do the minority favor the provision prohibiting a greater charge for a shorter than a longer haul, as it was shown to a satisfactory degree, as we think, in the hearing, that, where two competing points were connected by water as well as rail, it was impossible for the railroads to secure the traffic unless they made their rates as low as the water rates, and that while they might be able to do this on a portion of their traffic, it would be destructive of their interests to reduce all their rates to those which were forced upon them between certain points by the competition of the water routes."

It is obvious, therefore, that, in the House as well as in the Senate, it was understood that the existence of competition was intended to be included in the margin of discretion provided for by the Senate measure. The question as to this point was distinctly marked ; the debate, so far as this section was concerned, was upon that basis. On July 30, 1886, the substituted bill was agreed to and passed on the part of the House. A conference committee was appointed, and at the second session of the Congress that committee agreed upon a report, which was presented to the Senate December 15, 1886. By this report the fourth section of the Senate bill was amended so as to read as it now stands.

The work of the conference committee was very elaborately and carefully performed. The two bills which were referred to it presented very clearly the views which had prevailed in the two houses respectively, on the general subject

of relative charges on long and short haul traffic—the House view of an inflexible rule, forbidding absolutely the greater charge for the shorter haul, and the Senate view that the rule should be subject to exceptions when the circumstances and conditions required it. The conference committee accepted deliberately the Senate view, and presented it, in the report to the two houses. In the Senate the report, before adoption, was discussed, and what was proposed by it on this point of vital interest was very distinctly brought out and made prominent; and in the House, where also the report was adopted, nothing which was said by any one indicated that the situation was otherwise understood.

It is impossible to resist the conclusion that in finally rejecting the “long and short haul clause” of the House bill, which prescribed an inflexible rule, not to be departed from in any case, and retaining in substance the fourth section as it had passed the Senate, both houses understood that they were not adopting a measure of strict prohibition in respect to charging more for the shorter than for the longer distance, but that they were, instead, leaving the door open for exceptions in certain cases, and, among others, in cases where the circumstances and conditions of the traffic were affected by the element of competition, and where exceptions might be a necessity if the competition was to continue. And water competition was beyond doubt especially in view.

In thus deliberately making provision for competition, even though it might be necessary to allow for the purpose exceptions to the general rule laid down in the statute, Congress must be supposed to have done so because the public interest required it. That competition is the life of trade is one of the most generally accepted of maxims; among its principal benefits is the protection it gives against extortionate charges. But legitimate, open, and fair competition was meant; not everything that has been done under the name of competition, and which in many cases has been equally destructive of public and of private right. Among the common abuses have been the granting of special favors in exceptional rates, rebates, drawbacks, etc., all of which are now expressly prohibited by law when they assume the form or un-

just discrimination. There has also been favoritism between places and communities as a result of violent competition; but this also is no longer permissible. Other similar wrongs will be referred to further on; but the wars of rates, under the excitement of which traffic is carried at a loss, to be made good by excessive charges on other traffic or at other times, is not the least of those from which the public has suffered. And these wars are as indefensible when vessel owners are their objects as when made between the railroads themselves, and are not to be justified on any pretense of competition. Water transportation is entitled to such traffic as in fair rivalry and at fair prices it can take; and the railroads in competition with it must recognize this right, and not recklessly attempt to preclude its exercise. It is true that while the roads are obliged to publish their tariffs and the carriers by water are not, the former are at a disadvantage in the competition; but possibly the law in this regard may be amended if justice shall be found to require it.

Every railroad company ought, when it is practicable, to so arrange its tariffs that the burden upon freights shall be proportional on all portions of its line, and with a view to revenue sufficient to meet all the items of current expense, including the cost of keeping up the road, buildings, and equipment, and of returning a fair profit to owners. But it is obvious that, in some cases, when there is water competition at leading points, it may be impossible to make some portion of the traffic pay its equal proportion of the whole cost. If it can then be made to pay anything toward the cost, above what the taking of it would add to the expense, the railroad ought not, in general, to be forced to reject it, since the surplus, under such circumstances, would be profit. As has been tersely said by M. de la Gournerie, formerly Inspector-General of bridges and railways in France, a railroad "ought not to neglect any traffic of a kind that will increase its receipts more than its expenses"; and long-haul traffic which can only be had on these terms may sometimes be taken without wronging any one, when, to carry all traffic, or even the major part of it, at the like rates, would be simply ruinous. But we desire to apply generally to every kind of com-

petition herein discussed the observation above made, that when competition leads to the transportation of property below actual cost, fairly computed, it ceases to be legitimate. Fair and reasonable competition is a public benefit; excessive and unreasonable competition is a public injury. Competition is to be regulated, not abolished. The other sections of the law of themselves imply ample authority for its regulation, and, in connection with the fourth section, support the interpretation that it is wholly inadmissible to press competition to a point where expenses are increased beyond the increase of income.

II. The question whether railroad competition with other railroads which are not subject to the control of this law, can present a case of dissimilar circumstances and conditions, within the meaning of section 4, may possibly be one of greater doubt. The classes of roads not thus subject, and whose competition might be severe, are the Canadian roads and roads which are entirely within the control of a single State. As regards the latter, it is not improbable that cases exist of roads not restrained by any long and short haul clause corresponding to the Federal statute, which are so situated in respect to rivals coming under the law of Congress as to be able to monopolize to the public detriment the traffic at important points of competition, unless the latter are given equal freedom of action. We do not understand, however, that any of the pending applications are of this nature, and we therefore leave such cases to be considered when they shall be presented more directly. Competition with Canadian roads may, it is believed, present a case of dissimilar circumstances and conditions. Whenever such roads compete with roads in the United States for business between one part of our country and another, a state of circumstances arises and exists as to such business which justifies American roads in meeting such competition by a corresponding reduction of rates, without regard to the fact that in so doing the rates between the terminals may be reduced below rates to and from intermediate places which are otherwise reasonable and just in themselves. The fact that American roads are left free to meet such competition is of

itself an assurance that no extensive war of rates is likely to be engaged in by the Canadian roads, or, if engaged in, to be long pursued.

III. The competition with each other of the railroads which are subject to the Federal law can seldom, as we think, make out a case of dissimilar circumstances and conditions within the meaning of the statute, because it must be seldom that it would be reasonable for their competition at points of contact to be pressed to an extent that would create the disparity of rates on their lines which the statute seeks to prevent. But we cannot now assume that no case has arisen or can hereafter arise which, on its own peculiar facts, and in consideration of its special equities, can be deemed to present a just claim under the statute.

First, it may be observed here, that in some parts of the country it is not easy to separate railroad competition altogether from competition by the water-ways.

Water competition is not limited in force, strictly to the points of contact of water and rail lines, but extends its influence to an indefinite distance therefrom, qualifying to greater or less extent the all-rail rates. But passing that consideration by, it will be found on investigation that cases will exist in which, unless the force of strictly railroad competition is allowed to create exceptions under the statute, an existing competition which is supposed to be of public interest must come to an end. And where that is the case the strong lines will in general be gainers at the expense and sometimes to the destruction of those which are weaker.

One such case is that of the railroad extending from Pittsburgh, Pa., parallel to the Pennsylvania Railroad as far as Youngstown, and thence to Ashtabula, Ohio, where, through connection with the Lake Shore, it gives to the people of Pittsburgh and Youngstown competition with the Pennsylvania road in their business to and from New York and New England. The peculiarity of the competition is, that the business on the roads respectively is started in opposite directions when destined to the same point, so that on east-bound traffic from Pittsburgh the haul by one road is shorter than from Youngstown and longer by the other.

As the Pennsylvania road has the shorter line, it is in position to determine what the rates shall be, and the longer line has no option but to conform to them. In making them the leading road gives to Pittsburgh lower rates than to Youngstown, as it justly should do, in recognition of the geographical position. But the other road must do the same, though over its line the traffic between Youngstown and the seaboard will have the shorter haul. There is nothing unreasonable or unjust in this; and if the longer line were to attempt a change which should reduce the rates from Youngstown to the level of those from Pittsburgh, it would in doing so only open a war of rates in which all the advantages would be with its rival. Finding itself in this dilemma, it applied to the Commission for an order permitting a greater charge to be made on traffic to and from Youngstown than is made on that to and from Pittsburgh, and its application is strenuously opposed by the Pennsylvania road, which insists that competition by this roundabout route is illegitimate and ought not therefore in any manner to be aided.

Whether this position is sound the Commission may determine hereafter. It is sufficient to say of the case at this time, that it is one—and not a solitary instance—in which a strict application of the general rule laid down by the statute must be fatal to competition. If the competition in itself is illegitimate, it may be right to permit its destruction. But it is not admitted by those interested in the road just mentioned that its case is of this nature. It is shown that it was constructed by Pittsburgh capital for the express purpose of the competition; and it appears that though the route is indirect, the competition has given it considerable business, and large investments have been made in reliance upon its continuance.

One fact obvious on the statement of this case is, that the wrong against which the long and short haul clause of the statute is aimed is not to be found in it. When the greater charge for the shorter haul over the same line in the same direction is spoken of, the natural suggestion to the mind is of a line leading with some directness to the place to which the traffic is destined; and there seems to be in such greater

charge a manifest unfairness, since it deprives the place of shipment nearest the destination of its proper advantage of situation. But in the case stated the position is the opposite to this; the greater charge for the shorter haul preserves the proper advantage of situation, and has in itself no element of injustice to localities. It is the situation which forces upon the road an unequal charge which is nevertheless not unfair; and a strict application of the statute must compel the surrender of what is now competitive traffic to the older and more direct route, whose very conformity to the general rule precludes conformity by the competitor.

There are other cases in the country of roads now taking part in competitive traffic, which the peculiarities of situation will compel them to abandon if the long and short haul clause of the statute is strictly applied. This to some extent might be the case with certain north and south roads, like the road from Cincinnati to Toledo, and that from New Albany to Chicago, which have heretofore engaged considerably in east and west bound traffic which they deliver to or receive from other roads crossing them, or at their terminals. In many cases these roads have been accustomed to make the greater charge for the shorter haul simply because the direction they run compels it; but in doing so they may wrong no one, because the rates are not determined by them, but by the direct east and west lines, and are made with regard to relative distance. Both the roads named now have applications pending for relief from an embarrassment for which they are not themselves responsible; and they aver, with plausibility at least, that the public interest will suffer if they are shut out from such share in competition as they have hitherto taken. We do not pass upon these cases finally at this time, and therefore do not undertake to say of them that they constitute cases in which the competition of roads subject to the Federal law creates the dissimilar circumstances and conditions which make up an exceptional case. But this brief reference to the facts is suggestive of a possibility, at least, that the exceptional case may exist; and if it does exist, a strict enforcement of the general rule might be found quite as injurious to the public interests as to those

of the railroads which would thereby be shut out from competition.

IV. Whether the competition of towns which are trade centers or distributing points can in any case make out the dissimilar circumstances and conditions, independent of the competition of the carriers, is a question which may be said to be presented by the evidence taken, but not with such distinctness as to call for an expression of opinion as this time. The pre-eminence of such trade centers in the territory reached by the petitioner's roads is peculiar, and has probably been increased by the concessions in rates which the railroads have made to them, while making less concessions or none at all to less important stations. This condition of affairs tends to perpetuate itself, and the disparity of rates as between competitive and non-competitive towns—the former being the “trade centers”—must have had some influence to increase steadily the disparity in growth and prosperity.

By some of the witnesses before us this was bitterly complained of, while by others it was defended as being best for both classes of towns. The smaller towns in this part of the country, it was said, are dependent on the trade centers for their supplies, and they get indirectly the benefit of low rates to the distributing points in lower prices than could otherwise be given to them. In proportion also as the distributing points are prosperous, they can and do extend to the dealers at other points credit and indulgence. The prevalence of such ideas, and the acting upon them in making freight tariffs, gives to railroad managers a power of determining within certain limits what towns shall be trade centers, and what their relative advantages; and while it may be, as they assert it is, that in deciding upon rates under the pressure of the competition of trade centers they endeavor to do justice between them, yet as they do not, at the same time, feel a like pressure from non-competitive points, it is obvious that justice to such points is in great danger of being overlooked; and it is altogether likely that it is so to some extent.

One result is that towns recognized by railroad managers as trade centers come to be looked upon as towns with special privileges, and other towns strive for recognition as such,

and complain perhaps of injustice when they fail. It was made very clear by the evidence produced in behalf of the railroads, that the exceptionally favorable rates which were given to certain localities were in some cases given to build up trade centers; and as they had had that effect, and large establishments had been located at such centers, invited by the favoring rates, it was urged that there would be injustice in now compelling the roads to go back to the rule of equality. Of this it may be said, *first*, that, as between different localities, it is no sound reason for discriminating in favor of one as against another, that the purpose is to build up the favored locality as a trade center; and, *second*, if the discrimination has existed and has had its effect, the fact that large establishments have thereby been encouraged is no reason why the injustice should be perpetuated. This statute aims at equality of right and privilege, not less between towns than between individuals; and it will no more sanction preferential rates for the purpose of perpetuating distinctions than of creating them.

These general views will indicate, as far as we deem at this time necessary, the bounds within which the railroad managers must limit their action in making charges which are greater in the aggregate for the transportation of passengers or of the like kind of property for a shorter than for a longer distance over the same line in the same direction, the shorter being included in the longer distance. With responsibility to the law and to the restraining power of the Commission, in case the bounds are exceeded, it may confidently be expected that all carriers will bring themselves into conformity with the general law so far as it may be found reasonably practicable, and that the occasions for special interference will not be numerous. Our observation and investigations so far made lead to the conclusion, that strict conformity to the general rule is possible in large sections of the country, without material injury to either public or private interests; and that in other sections the exceptions can be and ought to be made much less numerous than they have been hitherto, and that when exceptions are admitted the charges should be less disproportionate. Very many of the roads,

as we are informed, have so arranged their tariffs as to make no exception whatever ; and where that has been proved to be reasonably feasible, return to the former custom cannot be tolerated. In any case in which a company fails to bring its tariffs into conformity with the general rule, if parties whose interests are thereby unfavorably affected complain, it must be prepared to justify its action by a showing of circumstances and conditions which render it just and reasonable.

In the views above expressed the members of the Commission, after full consideration, are unanimous.

The order for temporary relief which was made in favor of the petitioner will be allowed to remain in force until the day originally limited for its expiration, and in the meantime its officers will have the opportunity to make thorough revision of its freight and passenger tariffs, in order to bring them as nearly as may be reasonably feasible into harmony with the general rule of the statute, and with the views expressed in this opinion. That they may be brought much nearer to conformity than they now are, without the sacrifice of any substantial interest, we have very little question ; and as business adapts itself to the new principle established by Congress, it will no doubt be found that exceptions can safely and steadily be made less and less numerous.

NOTE.—Like orders to this were made in the other pending cases.

THE CHICAGO AND ALTON RAILROAD COMPANY
v. THE PENNSYLVANIA RAILROAD COMPANY.

THE SAME v. THE PENNSYLVANIA COMPANY.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAIL-
ROAD COMPANY v. THE NEW YORK CENTRAL
AND HUDSON RIVER RAILROAD COMPANY.

Tried June 16 and 17, 1887.—Decided July 14, 1887.

The defendants adopted a regulation, that they would not sell tickets for and over the line of a connecting road, unless such connecting road would abstain from paying commissions to their agents on the sales made, and would make promise to that effect. Such a regulation is reasonable, and therefore legal.

A railroad company has a right to insist that its agents shall be its employees exclusively, and it is not obliged to permit any other company to make them its employees also.

The requirement in the Act to Regulate Commerce that common carriers shall "afford all reasonable, proper and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding and delivering of passengers and property to and from their several lines, and those connecting therewith," will not require a railroad company to sell through tickets over the line of a road whose managers persist in offering commissions to the agents who sell such tickets.

The practice of paying commissions to the agents of other roads on tickets sold over the road of the company paying the same, condemned as demoralizing, and as an improper drain on corporate resources.

If a passage ticket over several roads is a reasonable facility of travel, the privilege of paying a commission to the agent who sells it, and who would be required by duty to his employer to sell it when called for, without any commission therefor, cannot be regarded as an incident to the facility, and therefore cannot be insisted on.

William Brown, for complainants.

John Scott, James A. Logan, J. T. Brooks and Frank Loomis, for defendants.

REPORT AND OPINION OF THE COMMISSION.

SCHOONMAKER, Commissioner.

The complaints in these cases are founded upon the third section of the Act to Regulate Commerce, and charge violations of that section by the defendant companies in refusing certain facilities for receiving, forwarding, and delivering passengers to complainants' lines, consisting of through or coupon tickets, which, being afforded to other and competing companies, give, the complainants allege, undue and unreasonable preference to those companies. The questions involved in these three cases are so similar that they can properly be considered and disposed of together.

The material facts found by the Commission are as follows :

The Pennsylvania Companies, defendants herein, own or control connecting lines of railroad from New York and Philadelphia to Chicago and St. Louis. The New York Central Company, defendant, owns or controls connecting lines from New York to Chicago. Through passenger tickets are sold by the defendants over the routes they control to the termi-

nal points reached by their respective lines. At Chicago the roads of the complainants have their eastern termini in proximity to the termini of the defendants' lines, and from there extend westerly to Kansas City and other points. Several other roads, competitors of complainants, also lead from Chicago to Kansas City and other western points, and have substantially similar means of connection with the defendants' lines for the transfer of passengers and baggage.

By mutual arrangement between the various companies whose roads form continuous lines from New York, Philadelphia, and other places on the routes of defendants' roads in New York and Pennsylvania, to Kansas City, through or coupon passenger tickets have been sold by the defendant companies at their stations in New York and Pennsylvania, over their own respective lines, to Chicago, and thence to Kansas City, over the roads of the complainants or other such connecting roads as passengers might prefer. For passengers from the West to the East through tickets of a like character have been sold by the complainants and other companies, from Kansas City to points on the roads of the defendants desired to be reached by travelers, in New York, Pennsylvania, or other States. Through tickets of this character with corresponding checking of baggage are a manifest accommodation to travelers, and afford material facilities in making long journeys. In the sale of these tickets the company selling them was understood to act as the agent of the other roads over which the traveler might pass on his journey, and each company was deemed responsible to the traveler for its own acts in conveying the holder of the ticket.

For several years prior to the 5th of April, 1887, when the Act to Regulate Commerce took effect, substantially all the railroad companies of the country, including the complainants and defendants, paid commissions, varying in amount from two dollars to five dollars a ticket, to the ticket agents of other companies by whom the through tickets were sold. These commissions sometimes aggregated as much as the salaries paid the ticket agents by the companies that employed them. The commissions paid by complainants and some other companies since the first of April last have been

fixed by agreement at one dollar a ticket from Chicago to Kansas City.

The defendant companies and some others for about two years have made earnest efforts to abate the practice of paying commissions. The testimony shows that the commissions paid on through tickets have usually amounted to from twenty to twenty-five per cent. of the receipts from such sales, and that the official reports of the companies have concealed this expense, and only showed the net receipts from passenger tickets after deducting the commissions.

About a month before the Act to Regulate Commerce became operative the defendant companies took steps to procure agreements with their connecting companies to abolish the commission business altogether.

With this end in view they sent printed circulars, on or about the 15th of March last, to their connecting companies, expressing their willingness to continue to act as agents in the sale of through tickets, and stating the nature of the agreement required. The circular of the Pennsylvania Company stated as follows :

“In view of the severe penalties for infractions of the law, neither of these companies can consent to act as agents for your company (if you should desire it to do so) in the issuance and sale of through tickets except upon the following conditions :

“*First.* Your authority to so act.

“*Second.* Your agreement that the proposed joint tariffs will be satisfactory.

“*Third.* Your agreement not to issue or cause to be issued any new forms of through tickets over any of our lines without our formal consent thereto.

“*Fourth.* Your promise not to pay, either directly or indirectly, a commission or any consideration whatsoever to agents or employees of these companies, or to any other person or persons, on account of the purchase or sale of tickets issued by either of these companies at its regular ticket offices, or at other places in the territory adjacent thereto.

“*Fifth.* Your agreement to confine your own issue of tickets

and orders for tickets or transportation exclusively to offices immediately on the line of railroad controlled by your own company, thereby permitting us to ticket all passengers over your line or lines, at lawful rates, from all points where either of these companies has a line of railroad and you have none.

“If it be your desire these companies will cheerfully continue to act as agents for your company on and after April 1st, 1887, upon similar premises and conditions to those above cited.”

The circular of the Pennsylvania Railroad Company was identical in this respect with that of the New York Central Company hereinafter set forth.

The complainant, the Chicago and Alton Railroad Company, received these circulars signed by the general passenger agents of the Pennsylvania Company, and the Pennsylvania Railroad Company, respectively, and refused to enter into the agreement proposed, claiming the right to continue to pay commissions to the agents of the Pennsylvania companies upon their sales of through tickets.

The circular sent by the New York Central Company and the Pennsylvania Railroad Company contained the following statement:

“In view of the severe penalties to be inflicted in cases of violations of the law, this company cannot consent to act as agent for any other company in the issuance of through tickets, unless notified that it is authorized to so act, that the proposed joint tariff will be satisfactory for the time, and that the companies whose authority is thus obtained will refrain from the payment of a commission, drawback, rebate, or any form of consideration to the agents or employees of this company, or to any other person or persons on account of the purchase or sale of this company's issue of tickets in the territory adjacent to our lines.”

The complainant, The Chicago, Rock Island and Pacific Railroad Company, received a copy of the circular of the New York Central Company containing this statement, and refused to consent thereto, claiming the right to continue to pay commissions.

A large preponderance of the companies to which these circulars were addressed assented to the propositions they contained, and signed agreements to make them effective.

From seventy to eighty per cent. of the companies having connections with the Pennsylvania systems agreed to discontinue commissions. Of two hundred and thirty-four companies to which the circulars of the New York Central Company were addressed, two hundred and fifteen assented, and only nineteen refused. A large number of other companies in the territory east of the Mississippi and Illinois rivers, and the eastern shore of Lake Michigan, and twenty-nine Southern companies, one hundred and ten in all, entered into similar agreements. Sixteen companies in the territory named, and three Southern companies, refused. It also appeared by the complainants' testimony that of two hundred and thirty-six roads with which they do business, including all of the New England roads, all except twelve agree to allow commissions. On account of the refusal of the complainant companies to discontinue the payment of commissions to the agents of the defendant companies, and to agree to refrain from that practice, the defendants, after the 4th of April last, refused to sell through tickets over the complainants' roads from Chicago and St. Louis to Kansas City, and still refuse solely for those reasons. They express their willingness to sell through tickets over the complainants' roads whenever they will agree to discontinue commissions upon the defendants' issue of tickets. The defendants continue to sell through tickets over the connecting roads of companies that have assented to the agreements. The testimony does not show that the defendants have knowingly sold through tickets since the 4th of April over the roads of companies that have refused to enter into the agreements.

On these facts the complainants aver that the defendants refuse to afford to them reasonable, proper, and equal facilities for receiving, forwarding, and delivering passengers, and give undue preference to competing roads, in contravention of the provisions of the Act to Regulate Commerce.

The defendants deny that they have violated the provisions

of the Act, and claim that they have the exclusive right to control their own agents, to fix the amount of their compensation and to pay it themselves; that the payment of commissions by other companies is demoralizing to their agents, and often leads to discriminations to passengers for roads paying large commissions, by division of the commission between the agent and the passenger; that commissions consume a considerable percentage of the revenue from the sale of through tickets; that without commissions all connecting roads stand on a basis of equality, and passengers select their own routes uninfluenced by agents having an interest in the form of commissions in persuading them to choose some particular route.

The thirteenth section of the Act to Regulate Commerce provides that, for anything done or omitted to be done by any common carrier subject to the provisions of the Act, in contravention of the provisions thereof, application may be made to the Commission by petition, which shall briefly state the facts, and the further proceedings to be taken by the Commission are then specified. This indicates the jurisdiction of the Commission in respect to complaints by persons or corporations for the causes described. The offences of which the Commission has cognizance are anything done or omitted to be done in contravention of the provisions of the act.

In the cases under consideration it is necessary that it should reasonably appear that the acts of the defendants of which complaint is made are in contravention of the provisions of the act. This involves the question whether the act makes it the duty of the defendants, without any agreement or arrangement for the purpose, to sell through tickets over the roads of the complainants, and also whether the complainants can insist on paying commissions to the agents of the defendants, notwithstanding the opposition of the defendants thereto. Railroad corporations in the States are creations of the State governments, and their powers and duties are defined by their charters or by general laws. In the Territories, which are subject to the exclusive jurisdiction of Congress, railroads may be chartered by the Federal

Government or by its authority. The Act to Regulate Commerce does not make it the duty of State railroads to organize and operate through lines of transportation, consisting of separate roads owned by different companies. The organization of such lines is left under the act to the voluntary action of railroad companies, as it existed previously. But when railroad companies associate to constitute through lines for interstate traffic, they become agencies of commerce, as the courts have adjudged, and in the conduct of the business so assumed, voluntarily subject themselves to the control of Congress under the power contained in the Constitution, "To regulate commerce with foreign nations, and among the several States, and with the Indian tribes." Congressional regulation is necessarily exercised by laws enacted for the purpose, and the extent of the regulation intended is measured by the terms of the law. The law in this instance does not in terms require one railroad company to sell through tickets over the road of another company. It is substantially a reproduction of the corresponding provision of the English Railway and Canal Traffic Act of 1854, under which the English companies claim they were not authorized to sell through tickets over other roads.

In the absence of statutory authority, one railroad company can only sell tickets and check baggage over the road of another company by agreement. The English statute of 1873, amending the act of 1854, was enacted to give this authority and to make its performance a duty.

That statute, so far as material, is as follows: "The said facilities to be so afforded are hereby declared to, and shall, include the due and reasonable receiving, forwarding, and delivering, by every railway company and canal company, and railway and canal company, at the request of any other such company, of through traffic to and from the railway or canal of any other such company, at through rates, tolls, or fares." As no such provision exists in our statute, the decisions of the English commission and courts relating to through booking, founded on a statute declaring in terms the duty of "through rates, tolls, and fares," under which through booking is mandatory, are not applicable.

By agreement between companies, however, through tickets very properly are sold and used over connecting roads, as a convenience of passenger traffic, and an inducement for patronage. Such tickets very evidently are a great convenience to travellers, and perhaps to connecting roads; but they are a part of the voluntary arrangements for business purposes, like joint tariffs, interchange of cars, and common use of depots. It being therefore, under our statute, matter of mutual agreement whether coupon or through tickets shall be sold by a railroad company over roads of other companies, it follows that the form of such tickets, and the manner of their sale, are also matters of agreement by the companies interested. If companies can agree upon their tariffs, the form of their tickets, and how they should be sold, they have the right to do so, and by such agreement become interstate carriers, but if they cannot agree the act does not undertake to coerce them to do business together upon terms that may be justly objectionable or injurious.

It is true as urged by complainants that the third section of the act requires that "every common carrier subject to the provisions of the act shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers and property to and from their several lines, and those connecting therewith, and shall not discriminate in their rates and charges between such connecting lines."

Through tickets are not indispensable for these purposes; but assuming for the sake of the argument that they may be deemed "facilities" for the receiving, forwarding, and delivering of passengers to connecting lines, carriers are only required to afford reasonable, proper, and equal facilities. They are not required to afford special, unreasonable, improper, or unequal facilities.

This presents the question whether the payment of commissions is in itself, or as incidental to the enjoyment of a facility, reasonable and proper within the purview of the statute. The facility of through tickets is equally offered to all, and may be enjoyed without commissions. If the com-

pany selling the tickets should charge a commission it would doubtless be regarded as an imposition, and therefore unreasonable and improper. These commissions are gratuities to induce special efforts for the company paying them. If the statute does not give one company authority to subsidize the agents of another company, and if the practice is injurious in its effects, it certainly cannot be reasonable and proper.

The statute does not divest a railroad company of the exclusive right to control its own internal affairs, to employ its own agents, to regulate their duties, and to pay them such compensation as it may deem proper. The right of ownership of railroad property, with the power of control over employees and management of the property, is as absolute under the act as before its passage. The regulation of commerce between the States, which is all that the act contemplates, does not involve community of property, or joint control of subordinates among the several companies that honor through tickets. The corporate powers of every company, for all administrative and governing purposes within its prescribed sphere, remain unimpaired. With the legitimate exercise of these powers another company has no concern, and no right to intermeddle.

For the proper government of their own subordinates the defendant companies have forbidden their agents to receive commissions from other companies, and directed them not to sell tickets over roads of companies that refuse to recognize this corporate authority, but insist on subsidizing the agents. In these directions the defendants have not transcended their reasonable rights. One person or corporation has no right to interfere with the employees of another, and the statute does not disturb this old and sound principle.

The defendants might rest upon their right to control the official conduct of their own agents. But they go further and show by evidence the practical effects of commissions, and that their natural and usual tendency is to a variety of abuses. A witness of experience and large opportunities for observation testifies as follows :

“It is in the articles of the organization of the Pennsyl-

vania Company, and I believe in the organization of the Pennsylvania Railroad, that any officer, no matter who, from president down, shall not be permitted to receive any compensation from any other corporation, without a resolution of the board of directors to that effect; and all the salaries and compensation so received are required to be covered into the treasury of the Pennsylvania Company and accounted for. This is done simply for the reason, that we do not believe any railroad company can properly conduct its affairs when it permits its agents and employees to receive compensation for doing the same service for other companies. We know we had in our examination of this matter found that some of our ticket agents were receiving a greater amount of commissions from foreign railroad companies than we were paying them salaries, and instead of being our employees, they were the employees of the other railroad companies, and so far as our company was concerned we lost control of them entirely."

He further testified that the commissions were paid for two purposes; one was for the purpose of inducing the agent to sell tickets over lines which paid the commission, by paying him a sum of money for so doing, and so large a sum as would enable him to pay a portion of it to the party whose traffic he wished to obtain.

Another witness testified that he had personal knowledge of a great many cases, too numerous to be cited, where ticket agents had divided the commission with the passenger, thereby constituting a different fare for the same ticket for the same company; that connecting lines gave agents of initial companies orders to divide these commissions, contrary, in a great many cases, to the orders of the company by which the agents were employed; that these commissions had been for base purposes and to demoralize the agents.

A practice capable of producing, and having a tendency to produce, results thus described, cannot be reasonable or proper, and a railroad company is fully justified in the use of all lawful precautions to protect itself and its agents against such invasions of its corporate authority, and of its business morality. According to the testimony, the defendants are

supported in their position on this question by a very large majority of connecting roads, showing a decided preponderance of opinion against the practice.

The complainants insist that the payment of commissions is only additional compensation for services rendered by the agents, and that they have the right to pay them.

An officer of one of the complainants in answer to the question, what object is to be accomplished by paying an agent commissions by different companies, if he has already a full salary from the company which employs him, testified: "I should say to induce him to sell their tickets in the first place, and the next place to explain the routes which lead from one city to another, and that he may be able to make himself advantageous to the passenger who is in New York City who is not posted on the routes west of Chicago."

The claim of the complainants was stated by their counsel as follows: "We simply claim that we have the right to pay anybody for services rendered, and that we have the right to determine whether it shall be by salary or commissions."

The scope of the complainants' position is clearly presented by these statements. It is the distinct assertion of a right of one corporation to employ and pay, for its own interests, an official servant of another corporation to which his service is primarily and exclusively due. A theory of this character ought not to be, and is not, recognized in business affairs, or in official life. A divided service between many masters cannot be satisfactory to any, and as a rule is injurious to the person so employed.

It follows from these views, that the defendant companies in prohibiting their agents from receiving commissions and in refusing to sell through tickets over the roads of complainants while they insist on paying commissions to defendants' agents, have not contravened the provisions of the act. The defendants seasonably and fairly offered to afford all reasonable, proper, and equal facilities for the receiving and delivering of passengers to and from their several lines, and those connecting therewith, and did not discriminate in any respect between such connecting lines. In requiring the ces-

sation of commissions to their agents, when entering into business arrangements with connecting roads, the defendants only demanded what was reasonable and proper, and the complainants, by their refusal to refrain from paying commissions on tickets issued by defendants, voluntarily excluded themselves from the reasonable, proper, and equal facilities offered to them in common with all other connecting lines.

The complaints in these several proceedings must therefore be dismissed.

All concur except Commissioner Morrison.

Commissioner MORRISON dissenting :

The same question is made in these several cases which, for convenience, may be considered as presented in the case of the Chicago and Alton Railroad Company against the Pennsylvania Company.

At Chicago these companies, complainant and defendant, occupy the same depot with the Chicago, Burlington and Quincy Railroad Company, a competitor of the Chicago and Alton road for Chicago and Kansas City business.

Before the "Act to Regulate Commerce" was passed, the Pennsylvania company was accustomed to sell through tickets over its line, and the lines of both the Chicago and Alton, and Chicago, Burlington and Quincy Railroad Companies. Up to that time it had been the custom of railroad companies, including the parties to this suit, and the said Chicago, Burlington and Quincy Company, to offer and to pay commissions for the sale of tickets over their lines. After the enactment of the said law, the defendant, assuming the payment of such commissions to be in conflict therewith, refused to continue the sale of tickets over such of its connecting lines (including the complainant's), as might continue to pay or offer to pay commissions. The conditions, upon which the defendant would continue the sale of complainant's tickets, appear above in the circular letter of March 15, 1887, clauses four and five, and to which defendant made its request for prompt reply, "to prevent inconvenience to the travelling public."

The Chicago and Alton Company refused compliance with these conditions, and continued to offer commissions to the agents of other companies, including the agents of the defendant. The defendant continued in its refusal to sell through tickets over complainant's line. The Chicago, Burlington and Quincy Company, while continuing to offer commissions to the agents of other companies than the defendant, assented to the conditions of the defendant, and defendant continued the sale of through tickets over the line of the Chicago, Burlington and Quincy Company.

These facts are undisputed, and they present the simple question, whether a common carrier, subject to the provisions of said act, may withhold from a railroad company and those who wish to use it, the same equal facilities for the "interchange of traffic," and "forwarding and delivery of passengers and property," afforded to a competing line and those who use it, until the prescribed line shall promise not to offer or pay commissions to the agents of the company exacting such promise.

The provision in the third section of the Interstate Law fixing the duties of companies operating connecting lines, says :

"Every common carrier subject to the provisions of this Act shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivery of passengers and property to and from their several lines and those connecting therewith."

By this provision, the operation of through lines with through ticketing and checking of baggage would seem to be, not a matter of agency or agreement dependent on the voluntary action of, or contract between, railroad companies, but a public duty imposed by law. So the English statute on the same subject is construed, and our statute is substantially the English statute of 1854, as amended in 1873, cited in the report of the Commission above. With the English statutes the English interpretation of thier meaning becomes important by a familiar rule of construction. And this view is supported by the 7th section of the "Act to

Regulate Commerce," the obvious meaning of which is, that connecting lines are to be treated as continuous or through lines for the purposes of commerce "among the several States."

The answer of the defendant avers that "it is ready, and has been since the 5th of April, 1887, to instruct its agents to sell tickets over complainant's railway, and to afford the complainant equal facilities with other railway companies in this respect, provided the complainant will cease, as other companies have ceased (including the Chicago, Burlington and Quincy Railroad Company), to offer and to pay commissions, bribes, or gratuities to respondent's agents for the sale of tickets." The defendant here virtually admits its refusal to sell tickets over complainant's line to be a refusal of equal facilities, and has admitted it by conceding it to others. It should not, therefore, be allowed to deny the same equal facilities to complainant.

But, waiving the question whether, under the above clause of section 3 of said act, it is the duty of carriers subject to the provisions of said act, to furnish to the traveller who demands and is ready to pay for it a through ticket as a "reasonable facility," yet it can hardly be questioned that if the carriers of the country choose to do so as to one connecting line, must do so as to others. A common carrier may not make discriminations whereby it will afford A a facility if he will take the Chicago, Burlington and Quincy, and deny it to B because he will take the Chicago and Alton road. And this is precisely what the defendant insists it may lawfully do.

The defendant rests the refusal to afford the same equal facilities to the complainant, and to those who travel over complainant's line, which defendant affords to the Chicago, Burlington and Quincy Company and those who travel over its line, on the refusal of complainant to discontinue payment or the offer of payment of commissions to the agents of other lines, including defendant's, which defendant condemns as an objectionable and demoralizing practice, and which it characterizes as bribes disguised in the form of commissions. It already appears that the defendant, with other common

carriers, has long participated in this practice, which is yet very general. In the said Act, pooling, rebates, drawbacks, and all unjust discriminations are declared to be illegal. The paying or offering to pay commissions on the sale of tickets is not. In ten or more years of the Interstate Congressional contests, these commissions were not mentioned in any bill presented or report made to the House or Senate. But, independent of the legality, or any question of domestic policy as to payment of commissions between the companies whose roads make connecting lines, the public, or so much of the public as may desire to travel over complainant's line, is entitled to that reasonable and equal facility afforded to those who seek the competing line. It is no answer to the public desirous of using railways as a continuous line, that there are differences as to the rights of companies among themselves. And so the law is declared in the case of *Hamman et al. v. Great Western R'y.*, 4 R'y & Can. Traf. Cases, 181.

In any view of the case, it seems to me that the defendant must sell through tickets to those who want them over the Chicago and Alton road, as it does over the Chicago, Burlington and Quincy. And I dissent from the views of my associates with greater diffidence, for the reason that this question is presented both as a question of law and of railroad ethics or morals. I would not willingly delay any reform in railroad administration, nor hinder the defendant in any well-meant effort to reform itself, which is the measure of its present effort, for it only exacts from companies with connecting lines that they shall discontinue the offer of commissions to its own, while they offer them to the agents of all other companies. The payment of commissions may be subject to such abuses as to demand discontinuance, but until declared illegal, they should not be made to excuse common carriers from the performance of obligations to the public, to enforce which obligations was the object of the law creating this Commission.

WILLIAM M. HOLBROOK AND OTHERS *v.* THE ST.
PAUL, MINNEAPOLIS, AND MANITOBA RAIL-
ROAD COMPANY.

July 14, 1887.

No order can be made against a railroad company on a complaint which is not supported by evidence.

If a railroad company avows a purpose to comply with the law, it must be assumed that it will do so, and is doing so, until there is evidence that the purpose is not lived up to.

W. E. Smith, for complainant.

S. S. Burdett, for defendant.

MEMORANDUM.

The petition in this case, which was filed April 18, 1887, avers that the complainants during the last fall and winter, for nearly two months, were denied cars by the defendant company; and fearing that the course of the defendant will be similar the coming fall, and thinking the present a proper time to bring the matter to the attention of the Commission, that the apprehended inconvenience may be avoided, the complainants apply to the Commission for some proper and adequate remedy. The reason given for the failure to supply cars to the complainants is stated to be, that the defendant has been engaged in constructing an extension of the road, and has used its rolling-stock for that purpose, thus making itself a preferred shipper.

As the facts stated did not show any violation of the law occurring since the Act was passed under which the Commission is acting, but only a fear that there might be such a violation, the Commission might with entire propriety have advised the parties that they should wait until it was seen whether their fears of misconduct on the part of the defendant were to be realized; the Commission having no authority to anticipate violations of law, or to issue mandatory process based upon suppositions or fears that any such violations will take place. But as it was quite possible the fears which were asserted might not be wholly groundless, it was deemed proper to send to the defendant company a copy of the petition, that it might have opportunity for explana-

tion, and also for giving assurances as to the future if inclined to do so.

This course having been taken, the defendant company answered, excusing its failure to furnish cars during the time of which complaint of deficiency was made by the complainants, and averring that the company had now procured an additional quantity of cars, so that it was believed there would hereafter be no difficulty in handling its business promptly and without delay. A copy of this answer was served upon the complainants, and this day was assigned for a public hearing, if the parties or either of them desired to have one.

The complainants have not appeared to-day, but have forwarded certain affidavits on which and upon the pleadings, and certain facts appearing by the report of the Railroad Commission of Dakota, they desire the case to be heard. The affidavits were taken *ex parte*, and the defendant company was not notified to appear for cross-examination when they were taken. They are not, therefore, legal evidence, and whatever they might show, we could not base a judgment upon them. We have looked into them, however, enough to satisfy ourselves that they do not show any violation of law committed since the Act to Regulate Commerce was passed. Nor does any such violation appear from anything else to which our attention is called. If, therefore, the complaint was sufficient in substance, it would stand without evidence of any overt acts of misconduct on the part of the defendant, which could support any judgment by the Commission, or any mandatory order. Under these circumstances we have no discretion but to dismiss the complaint.

If the defendant was guilty of any wrong prior to April of the present year, we can not for such wrong call it to account, because it antedates our authority. If at this time the defendant avows a purpose to comply with the law, we must not only assume that it will do so, but we must act upon that assumption until we have evidence that the purpose is not lived up to. At this time we have no such evidence, and these proceedings will therefore here terminate.

All concur.

M. A. FULTON v. THE CHICAGO, ST. PAUL, MINNEAPOLIS, AND OMAHA RAILROAD CO.**F. D. HARDING v. THE SAME COMPANY.**

Called July 14, 1887.—Decided July 20, 1888.—No. 2.

Where complaint is made of rates as excessive, the burden is upon complainant to make proof of the fact alleged, and if no proofs are put in by either party the complaint will be dismissed. This held in a case in which the rates were much higher than they had at one time been on the same line.

FIRST CASE.

Britton & Gray, for defendant.

REPORT AND OPINION OF THE COMMISSION.

BRAGG, *Commissioner* :

The complaint in this proceeding was filed on the 26th day of April, 1887. It avers, in substance, that during February and March, 1887, the defendant carried a very large amount of freight from Chicago to St. Paul and Minneapolis at less than half the rates it charged at the time of the filing of this complaint. It further charges, that in 1886 the rate complainant paid on first-class freight from Chicago to Hudson was forty cents per hundred pounds, and that at the time the complaint was filed it was seventy-five cents per hundred pounds. It also avers, that in 1886 the net traffic earnings of the defendant at its then rates were sufficient during that year to pay interest on its bonds, dividends on preferred stock, and to leave remaining in its treasury a surplus. The complaint relates to the rates between Chicago and Hudson, a distance of three-hundred and eighty-two miles, but it also charges in general that the rates at intermediate stations between these points are exorbitant. No damages are claimed.

To this complaint on the 16th day of May, 1887, the defendant filed an answer, which states, in substance, that the complaint shows on its face that the complainant has sustained no injury or damage. It further states that the rates fixed for carrying freights from Chicago to Hudson and other

points between Chicago and Hudson, by defendant over its line, are just and reasonable. A sworn copy of the tariff rates of the defendant in force on and after April 5th, 1887, between Chicago and Hudson and intermediate points, is made a part of the answer, as is also a sworn copy of the tariff rates in force on six trunk lines in the territory north and west of Chicago, for distances substantially similar to that between Chicago and Hudson; also a sworn comparative statement of the tariff rates of defendant between Chicago and Hudson, and all intermediate points, before and after April 5th, 1887. It further avers that the railroads between Chicago and Hudson are owned by two companies, namely, the Chicago and Northwestern Railway Company, owning and operating the line from Chicago to Elroy, a distance of two hundred and twelve miles, while that portion of the line between Elroy and Hudson, a distance of one hundred and seventy miles, is owned and operated by the defendant; and that the tariff complained of is the joint tariff made by the said two companies.

To this answer of the defendant, the complainant on July 11th, 1887, filed a sworn reply, in which he states, in substance, that in June, 1887, the defendant reduced its rates of which he had complained from five per cent. to one hundred per cent., thereby confessing that his complaint was well founded.

Neither party has offered any evidence. The burden of proof is on the petitioner to sustain the charges set forth in his petition, by evidence which shows with reasonable certainty that they are, in substance, true; and this he has not done. It further appears from the sworn reply of the petitioner to the answer of the defendant, that while he admits that the rates against which he complained have been reduced by the defendant from five per cent. to one hundred per cent. since his complaint was filed, yet he does not make any complaint against these reduced rates. The law contemplates that when complaint is made a carrier may change its rates before a hearing is had, so as to remedy the matter complained of, if it shall see proper to do so. As there is no evidence before us that the rates of the defendant now in

force are unreasonable, and, in fact, no complaint against them, the petition is dismissed without prejudice.

In this opinion all concur.

SECOND CASE.

BRAGG, *Commissioner* :

The complaint in this proceeding was filed on the 18th of May, 1887, and charges, in substance, that during the months of June, July, and August, in the year 1886, the defendant charged complainant on twine from Chicago to Hudson for the "McCormick Harvesters," fifteen cents per hundred pounds; and that in May, 1887, the defendant charged freight at twenty-nine cents per hundred pounds on the same kind of shipments and between the same points. The complaint avers that the last-named rate is unreasonable and unjust, but no damages are claimed.

To this complaint the defendant filed an answer on the 8th of June, 1887, in which, in substance, it admits that during the months of June, July, and August, in the year 1886, it charged fifteen cents per hundred pounds on twine from Chicago to Hudson, but avers that it was forced to do so by its competitors, who charged that rate from Chicago to St. Paul, and that this rate was compulsory upon the defendant, and was the result of a war of rates, and was a rate that was unreasonably low. It further states that from November the first, 1886, to April fifth, 1887, after this war of rates had ended, the defendant charged twenty-six cents per hundred pounds on such shipments from Chicago to Hudson; that from April fifth, 1887, to May sixteenth, 1887, the defendant charged twenty-nine cents per hundred pounds on such shipments from Chicago to Hudson; and that on the sixteenth of May, 1887, and since that time, the defendant has charged, and is now charging, twenty-five cents per hundred pounds on such shipments from Chicago to Hudson. The defendant avers that each of these charges, namely, twenty-six cents per hundred pounds, twenty-nine cents per hundred pounds and twenty-five cents per hundred pounds, were, and are,

each of them, just and reasonable charges for the service rendered.

Neither party has offered any evidence. The burden of proof is on the petitioner to sustain the charges averred in his petition by evidence which shows with reasonable certainty that they are in substance true—and as he has not done this, his petition is dismissed without prejudice.

In this opinion all concur.

THE PROVIDENCE COAL COMPANY v. THE PROVIDENCE AND WORCESTER RAILROAD CO.

Tried July 19th, 1887—Decided July 23d, 1887.

An offer by a railroad company to give a discount to any consignee who within a year shall receive at any one station a specified amount of freight, which offer purports to be made to secure speedy dispatch, but is not conditioned on speedy dispatch being made, is void, and if a discount is made to one dealer in pursuance of it, all others will be entitled to a like discount.

If the real consideration of the offer were to secure speedy dispatch, it should have been open to all who could accept it, regardless of quantity.

An offer of a special discount made professedly on one ground in the published tariff, cannot, when that ground fails, be supported by referring it to some other and different ground.

A railroad company cannot support a discount based on quantity of freight received by any one shipper, on the principles which are applied among merchants, whereby they give better prices in wholesale than in retail dealings. The cases are not analogous, since the naming of the quantity of freight that shall be compared to wholesale purchases must necessarily be altogether arbitrary, and the duty of impartial service which the company owes to the public will preclude special discriminations being determined by arbitrary tests.

The Providence and Worcester Railroad Company has one terminus on the river in Providence, and another across the river in East Providence; the one in Providence having been first constructed, and the other later, and for the convenience of the company. From the Providence terminus to points reached from both the distance is slightly the less. The company is not at liberty to make from Providence to such common points higher charges than from East Providence, in order to force the business to the latter terminus, and would be chargeable with unjust discrimination if it should do so.

The fact that a railroad company for many years has paid the charge for

hauling freight from wharves to its station, does not bind it to continue that practice, and if not bound by contract, it may stop doing so at any time.

J. Tillinghast, for complainant.

E. Metcalf, for defendant.

REPORT AND OPINION OF THE COMMISSION.

COOLEY, *Chairman* :

The complainant in this case is a copartnership composed of Henry C. Clark and another, doing business as dealers in coal at Providence, Rhode Island.

The petition by which this proceeding was commenced avers, that complainant has its coal-yards and wharves and place of business upon what is known as the Dorrance-Street Wharf estate, upon the westerly side of the Providence river, and lying between said river and Dyer street, which estate is owned by Henry C. Clark, and in the purchase and improvement of which he has expended large sums of money for the purposes of said business.

That the main line of defendants' road extends from Providence to Worcester, Massachusetts, but it has also a branch road extending from its tide-water pier and wharf estate in East Providence, Rhode Island, and connecting with its main line at Valley Falls, and also a branch road extending from its main line at or near its freight depot in Providence across the bridges and through and upon Dyer street to and connecting with complainant's wharf estate, and with other wharf estates upon the westerly side of the said river, and another branch road extending from the main line at or near its said freight depot across the bridges and through and upon South Water street in Providence, and connecting with the wharf estates there, upon the easterly side of the river.

That said Henry C. Clark, when the Dyer-street line of said railroad was first laid, acting in co-operation with defendant, expended large sums of money in laying rails upon his wharf estate, and in making switch tracks connecting the same with said street line, and has also made further expenditures since in maintaining the same to accommodate and

facilitate the transportation of coal and other merchandise to and from said wharf estate over the roads of defendant.

That complainant has thus the facilities for selling coal for shipment over said roads, and for delivery at the various stations thereon, if transportation can be obtained therefor at the same rates of freight that coal is transported at for other parties; but defendant, in contravention of complainant's rights and of the provisions of the Act to Regulate Commerce, has issued a tariff of freight rates for coal over its road which practically excludes complainants and many others from selling and delivering coal over and upon the line of its roads, in that, besides making unjust discrimination in favor of shipments consigned to its East Providence wharf, by receiving such shipments free of wharfage there, it also gives undue and unreasonable preferences and advantages in making a discount or rebate of ten per cent. "to any person, firm, or corporation who shall receive consignments of coal in any one year amounting to 30,000 tons or upwards, at any one station on the line of the road;" it being, as complainant avers, well understood and known that there is but one person on the whole line of the road who, under the unjust discrimination made by the defendant in his favor, has ever received, or in future, under the unjust discrimination made by the published tariff, can receive 30,000 tons of coal in any one year at any one station upon the road, namely, a dealer at Worcester in whose favor, as complainant avers, large and unjust discriminations and undue advantages in rates of freight, drawbacks, allowances and other privileges have for many years past been made by defendant, to the great injury and loss of trade over the road, not only by complainant but by other dealers, and at times almost to their entire exclusion therefrom.

That the tariff of published rates is also in contravention of said Act in that, though the distance from the East Providence wharf of defendant to Valley Falls and to all stations on the line of its road above Valley Falls is greater than the distance from Providence to the same stations, yet the rates of freight to all of said stations which are above Lonsdale, are greater from Providence than from East Providence.

Moreover, all persons, including complainant, shipping coal over said street lines are obliged to pay further sums for street hauling, so called; that is, for hauling for the distance between their wharves and the freight station of defendant in Providence, which street hauling was formerly, and as complainant claims should now be furnished by defendant.

The petition then avers the making of applications to the defendant to modify and correct its tariffs, and the failure of complainant's efforts in that direction, and it prays that defendant may be required to cease and desist from its unlawful, unjust, and unreasonable discriminations, preferences and advantages aforesaid, and to make due and proper reparation to complainant for damages sustained.

The answer admits the facts stated in the petition regarding the business of complainant, and proceeds to say that as to the branch railroad on Dyer street and South Water street in Providence, defendant owns and had for many years maintained railroad tracks on said streets for the benefit of complainant and other owners and dealers thereon, but that it owns no right of way on either of said streets; that said tracks were laid by permission of the City Council of Providence, which controls the mode of maintaining and using the same, and claims the right to cause the tracks to be removed upon reasonable notice without compensation, and that defendant is unable to use steam as a motive power on said tracks, and cars can only be moved thereon by horse power; the tracks constituting what is known as a street or horse railroad. Defendant admits the establishment of a freight tariff as charged, but denies that any unjust discrimination is thereby established or provided for, and further denies that only one person can receive the benefit of the discount offered to a consignee receiving 30,000 tons of coal within a year at any one station, and says it has reason to believe that within the present year not less than three persons will be entitled to such benefit. Defendant further denies that the tariff makes any unjust discrimination in rates as between the coal taken from Providence and that taken from East Providence to points above Lonsdale, and says that its road was built almost wholly for carrying coal, and defendant was

compelled by the city of Providence to build the branch to East Providence by threats to compel defendant to remove its street tracks and so prevent it from receiving coal at tide-water, and that the lower price for carrying coal over said branch railroad is rightful and just, and in no way involves discrimination in favor of one consignee and against another; that owing to the want of proper facilities at its station in Providence, which it is unable to enlarge without permission of the city—which refuses to grant the same—coal cannot be received at and carried from that station at the same price as from East Providence, and that the difference in the rates given in said tariff is not sufficient to cover the additional expense and risk incurred by defendant in taking coal in Providence instead of taking it at East Providence. And defendant avers that all its charges are just and reasonable, and that the 30,000 ton provision is so, because it says that the benefit thereof is reciprocal, inasmuch as the consignee entitled to a rebate under said provision must have supplied all the best facilities for the speedy handling of coal, and thereby enabled defendant to save expense in handling, hauling and delivering his coal, equal to the amount of the rebate, and further that complainant by selling coal to the consignees may entitle itself to such rebate, and therefore is not in any sense injured or discriminated against by said provision.

The case was heard on evidence taken in the main orally at the hearing, and we find the facts to be, that Mr. Henry C. Clark, the senior member of the complaining firm, many years ago established a coal-yard and wharf in the city of Providence and on Providence river, to be used in connection with the transportation of coal over the road of defendant; that the cost of real estate and improvements for that purpose has been a quarter of a million of dollars; that the complaining firm is now in the possession and occupancy of all the said real estate and improvements for the purposes of its said business; that the said coal-yard and wharf is a considerable distance from the freight station of defendant, and could only be reached by cars over rails laid by defendant along the streets, with the co-operation of said Henry C. Clark and by consent of the city authorities; that the city authorities

have allowed cars to be drawn through the streets only by horse power, and that for many years defendant paid the expense of the hauling of cars from complainant's yard and wharf to defendant's freight station in Providence, but never contracted to do so ; that the facilities of defendant for transacting its freight business in Providence have long been unsatisfactory and limited, and that defendant, to obtain better facilities, has now constructed a branch road connecting with its main line at Valley Falls, six miles from the Providence station, and extending from Valley Falls seven miles to a terminus in East Providence, on Providence river, across from and a little below the wharf of complainant ; that defendant since the construction of said branch road has been desirous as far as possible to do its coal business over such branch road, and that it now refuses any longer to be at the expense of hauling coal from complainant's wharf through the streets to its Providence station. Defendant has been in the practice of offering a discount of ten per cent. on the freight paid by consignees receiving some specified quantity at any one station within a year, beginning with the quantity of 5,000 tons, which was increased in 1886 to 20,000 tons, at which quantity only one dealer, whose place of business was Worcester, earned and received the discount. The offer in the tariff taking effect April 4th, 1887, was changed as to quantity and reads as follows :

“ For the purpose of facilitating quick dispatch of the coal cars of this company, a discount of ten per cent. will be made from the following rates, to any person, firm or corporation, who shall receive consignments of coal, in any one year amounting to 30,000 tons or upwards, at any one station on the line of this road. Quick dispatch to be construed an immediate unloading of coal on its arrival at destination.”

There was no reasonable probability when this tariff was put out that 30,000 tons would be received by any one consignee at more than three places on defendant's road, and it was doubtful if the quantity would be received at any other station than at Worcester, and it would probably be received by only one dealer there. In the tariff of rates so put out the charge per gross ton of coal from Providence and East Prov-

idence respectively to Valley Falls was made sixty cents, to Lonsdale the first station above it was sixty-five cents, but to the stations further on a difference was made in favor of the coal shipped from East Providence, which difference to all towns beyond the Rhode Island line was made ten cents per gross ton. The rate to Worcester by the East Providence line was fixed at one dollar a ton. Complainant endeavored without avail to secure a change in this tariff which should place Providence and East Providence on the same footing, and also to have the offer of discount withdrawn; that offer being thought to give the dealer at Worcester, who had the benefit of the offer in 1886, an advantage which would preclude complainant doing a profitable business. The margin for profit in wholesale dealings in coal is now very small, and may be stated at from ten to fifteen cents per ton.

From the facts as here found, the first question of importance that arises concerns the offer by defendant of a ten per cent. discount to any person, firm or corporation, who within any one year shall receive consignments of coal aggregating 30,000 tons at any one station. The complainant insists that this is unreasonable discrimination, while defendant on the other hand justifies the offer as a reasonable measure of policy in its business.

We have seen above that the published tariff undertakes to state the ground or consideration on which the offer is made. It is "for the purpose of making quick dispatch of the coal cars" of defendant; and the public is told that "quick dispatch" is to be construed an immediate unloading of coal on its arrival at destination. The defendant gave evidence that this immediate unloading of cars was important, but this is so obvious that the evidence was scarcely necessary. It was entirely admissible, therefore, that the defendant should make some regulation, or adopt some decisive measure, to ensure the quick dispatch which seems to have been in mind in making the offer.

When, however, we look at the terms of the offer, we perceive immediately that though the purpose may be to facilitate quick dispatch, the offer is neither expressly nor by any necessary implication made conditional on the quick dispatch

being facilitated. It seems to be expected that the parties who accept the offer will be prompt in unloading the coal; but they are put under no obligation to do so by the terms of the offer, and their legal duty in that regard would therefore be no greater than that of any other consignee receiving coal over the road. No promise of quick dispatch is exacted; no performance is made imperative. The authorities of the road in making the offer appear to have expected and assumed, that any customer of the road to the extent indicated would, as a matter of course and in his own interest, make quick dispatch, and that the attaching to the offer of any condition to that effect would be altogether unnecessary. They therefore attached none. Such being the case, it follows that any customer of the road who should become consignee to the extent specified would thereby perform the only condition on which the offer is based, so that whether the expectation of quick dispatch was or was not realized, he would be entitled to claim the rebate. No failure in immediate unloading would be an answer to a claim for the discount, when the discount had been offered upon another and distinct condition which had been fully performed.

The answer of the defendant no more than the published tariff, shows an understanding on the part of the railroad officials that the offer of discount is conditional on quick dispatch. By that pleading we are told that "the consignee entitled to a rebate under said provision must have supplied all the best facilities for speedy handling of coal," but it is not pretended or intimated that the offer requires this, or that anything more than the interest of the consignee and the requirements of convenience in his business are relied upon to secure this result. Whether the result is secured or not, the promise is left to stand on the single condition of quantity; and when the quantity is reached, the promised discount is by the terms of the offer due. And this very remarkable consequence might possibly follow if several persons should endeavor to earn the discount, namely, that while a consignee who had received the necessary quantity, but had been blamably negligent in unloading, might then demand and receive the rebate, another who had endeavored to reach the quantity but had fallen somewhat short, but who

all the year had been prompt and punctilious in making quick dispatch, could have no benefit whatever from complying with the only consideration on which the rebate is professedly supported, and for which it purports to be offered.

It is very manifest from this statement, and from the illustration given of what might naturally happen, that the pretended consideration is purely imaginary, and the promise of a discount, so far as regards the consideration on which it purports to be based, is deceptive and misleading. The published tariff is calculated and intended to lead the public to suppose that the offer is based upon a consideration of quick dispatch. But in fact the quick dispatch has no necessary connection with the offer; it is put forth as something confidently expected because of the offer, but is not required or insisted upon. The defendant has therefore failed, both in its published tariff and in its answer, to show any ground on which its offer can be supported; the mere expectation of a quick dispatch, while at the same time such dispatch is not required, being no ground whatever.

If we look into the evidence with a view to satisfy ourselves whether any such offer of discount could reasonably and lawfully have been made on an express condition of quick dispatch, we shall have no difficulty in perceiving that any such conditional offer would have had neither justice nor reason in support of it. The evidence in the case shows beyond question, what indeed common observation would teach us without other proof, that a party receiving a much smaller quantity than 30,000 tons can comply with a condition of quick dispatch, as promptly, fully and completely as can any larger dealer. If therefore a discount were to be offered in order to insure quick dispatch, a discrimination which should so limit the offer that a part of those who could and might desire to accept it would be excluded from its benefits, would for that very reason be unjust and indefensible. The discount in this case must consequently be held supportable neither on the published offer, nor on the statement in the answer, nor, so far as the consideration stated is concerned, on the evidence; and unless some other support can be found for it, it must be adjudged illegal.

On the argument an effort was made to uphold the dis-

crimination on a consideration of quantity merely ; the consignee who should receive more than 30,000 tons in a year at any one station being likened to a purchaser of goods at wholesale, and the consignee who received a lesser amount being compared to a purchaser at retail. It was said that a distinction in price is universally made as between these two classes of customers, and that the distinction would be as reasonable in the case of purchasers of railroad service as in that of purchasers of cloths or lumber.

One difficulty with this argument is that it is an after-thought. The defendant has publicly selected the ground on which it will base the discrimination proposed, and has published it in a paper required from it by law for the purposes of general information. It would be entirely admissible for defendant to change its ground in making a new offer, but the offer now under consideration must stand or fall on the ground selected for it.

But if this defendant should attempt to make a new offer based upon quantity merely, the analogy between the case and that of wholesale and retail purchasers of merchandise would not be found to be very close. The wholesale dealer is allowed concessions in prices, because his transactions in proportion to the amount purchased are fewer in number, they take less of the time and attention of the seller, and it costs him very much less to make them. It is perfectly reasonable that these facts should be taken into account in making bargains. But there is no certainty, and scarcely any probability, that the dealer who receives 30,000 tons of coal at some one station within a year will make his business cost less to the railroad company in proportion to quantity than the dealer who receives 25,000 tons only, or 20,000, or half that quantity. Indeed the selection of 30,000 tons as the test of what should be considered wholesale business would obviously be purely arbitrary, as also would be the naming of any other considerable quantity ; say 5,000, or 15,000, or 50,000. The selection of any one of these quantities could be defended on the distinction between wholesale and retail dealings as logically if not as plausibly as that of any other ; and the evidence in this case shows that the defendant in

years past has based its offer of discount on a receipt of consignments much below the 30,000 tons now required. The quantity named last year was 20,000 tons; so that on the argument now advanced, what was wholesale last year is retail this.

A distinction in rates as between car loads and smaller quantities is readily understood and appreciated; but no such distinction is made in this offer, and a customer of the road who should receive all his coal by car load, or even by train load, would be excluded if he fell short in quantity. And some possible results of the offer might be utterly inconsistent with considerations acted upon in wholesale trade. If a consignee, for example, earns the rebate by receiving 30,000 tons at a station to which the freight is a dollar a ton, he pays but \$27,000 for the transportation, but his rival at the same place, who reaches to 29,000 tons only, must pay for a less service, presumptively accomplished at less cost, and which is of less value to him, \$2,000 more. Such a result could not possibly be defended. The one consignee would be a wholesale dealer as much as the other, and common sense would pronounce unhesitatingly that if the larger charge for carrying the smaller quantity was reasonable, the discount to the other dealer must be without any just or reasonable support.

But when a question of rebates or discounts is under consideration, it might be misleading to consider them in the light of the principles which merchants act upon in the case of wholesale and retail transactions. There is a very manifest difficulty in applying those principles to the conveniences which common carriers furnish to the public; a difficulty which springs from the nature of the duty which such carriers owe to the public. That duty is one of entire impartiality of service. The merchant is under no corresponding duty, and may make his rules to suit his own interest, and discriminate as he pleases. There is no occasion to enlarge upon this now.

A discrimination such as the offer and its acceptance by one or more dealers would create, must have necessary tendency to destroy the business of small dealers. Under the

evidence in the case it appears almost certain that this destruction must result; the margin for profit on wholesale dealings in coal being very small. The discrimination is, therefore, necessarily unjust within the meaning of the law. It cannot be supported by the circumstance that the offer is open to all; for though made to all, it is not possible that all should accept. Moreover in testing such a discrimination we must consider the principle by which it must be supported; and the principle which would support a 30,000 ton limitation would support one of 50,000 or 100,000 equally well; the quantity named would be arbitrary in any case. It might easily be made so high as practicably to be open to the largest dealer only. A railroad company if allowed to do so might in this way hand over the whole trade on its road in some necessary article of commerce to a single dealer; for it might at will make the discount equal to or greater than the ordinary profit in the trade; and competition by those who could not get the discount would obviously be then out of the question. So extreme a case would not however be needful to show the inadmissibility of such a discount as is here offered; the injustice would be equally manifest if several dealers instead of one were able to accept the offer. A railroad company has no right, by any discrimination not grounded in reason, to put any single dealer—whether a large dealer or a small dealer—to any such destructive disadvantage.

In what is said above we do not mean to be understood as intimating that defendant is not saved something in cost and in labor by having the coal carried by it received in large quantities by single consignees. On the contrary we readily agree that its service for large dealers is somewhat less in proportion to quantity of freight transported, than is the like service performed for small dealers. We also agree that defendant may therefore seem to have an interest in restricting its dealings so far as possible to large dealers. But this is an interest that can only be consulted and acted upon in strict subordination to the rules of law; and one of the most important of those rules is, that in any discrimination between dealers, justice, if not a paramount consideration, shall

at least be kept in view. The carrier cannot regard its own interests exclusively—if it could, it might at pleasure, by methods easily available, drive all small dealers off its line, and center the whole trade in a few hands. The state of things that would result might be altogether for its interest and convenience, since it would then have fewer customers to deal with and fewer transactions for the same aggregate trade; but the wrong would be flagrant. The case suggested is more extreme than the one before us, but the wrong is sufficiently palpable here. And without further comment on this branch of the case, it will be sufficient to repeat, that when the defendant makes an offer of discount or rebate based on the 30,000 ton limit, the limitation is unreasonable and unlawful, because necessarily resulting in unjust discrimination. There is nothing in the showing in this case to justify the fixing of a limitation as the ground of rebate at any specified quantity, and therefore, if the discount is paid to one dealer, the payment will be evidence of the right of all other dealers to a like and proportionate discount.

A further question of importance concerns the difference in defendant's rates on coal shipped to stations on its main line from Providence and East Providence respectively. The facts important to an understanding of this question are, that defendant's road was first constructed from Providence through Valley Falls to Worcester, and that complainant at very great expense to its members provided itself with land and all necessary requirements for carrying on extensive dealings in coal near the terminus of defendant's road in Providence, and by co-operation with it, secured tracks into its yards and to its dock. But defendant's accommodations at Providence were limited and could not be enlarged unless at great expense; the city authorities it is said were disposed to interpose obstacles to such use of the city streets for railroad service as was essential, and defendant found it necessary to construct a new line from Valley Falls to East Providence where ample accommodations were secured, and where its business could be more conveniently and cheaply conducted. The distance from Providence to Valley Falls is

six miles, and from East Providence seven. Coal trains are made up at Valley Falls of loaded cars brought from Providence and East Providence without distinction. By the published tariff the rate upon coal from Providence and from East Providence respectively to Valley Falls is the same; sixty cents per gross ton; and it is also made the same to Lonsdale which is the first station above. But to all stations above Lonsdale a higher charge is made from Providence than from East Providence; the difference after the State line is crossed being in every case ten cents a gross ton. This difference is very important to complainant, and necessarily very prejudicial.

It is very evident that if it is fair and reasonable for defendant to make the charge on coal to Valley Falls from the two termini the same, there can be no justification for making different rates to the stations beyond, based on the fact that the coal comes from one terminus rather than from the other. The fact that a part of the coal taken from Valley Falls to Worcester was first received by defendant at Providence, and another part at East Providence, does not in any degree affect the cost or the value of its service in transporting it from Valley Falls on, and a discrimination in rates from Valley Falls based upon the fact that the coal had come from the one terminus instead of the other would have no reason and no justice to support it. The defendant might as well discriminate on the ground of the coal having come from different mines or different dealers. The discrimination made by the defendant's published tariff is therefore, presumptively at least, without justification.

It is claimed by defendant, however, that the additional cost of doing its business at Providence over the cost at East Providence is sufficient fully to support the difference made in rates, and that the fact of defendant making no difference at Valley Falls and Lonsdale cannot preclude its making them at other points. Passing over this last point for the present as not being one necessarily requiring a decision at this time, we are of opinion that defendant does not justify the making of the additional charge at any station.

The Providence line was first built, and complainant at

very large expense and in co-operation with the defendant has put itself in position to transact its business there. Defendant, because of inconveniences which it would escape, has constructed a new line and established a new station where the inconveniences will be less. Its policy now is to force the coal business as much as possible over the new line. We have no doubt its own convenience will thereby be consulted and the cost of its business somewhat reduced, but there is no evidence before us which would justify us in finding that the additional charge upon the coal received at Providence is only a fair equivalent for the additional cost. On the contrary we think the increased rate is imposed more from policy than out of regard to additional cost.

But we think also that under all the circumstances it is not admissible for defendant to impose upon its patrons at Providence, whose investments for business with it were made before the East Providence line was constructed, an additional charge because of the inconveniences attending the transaction of its business at that station, and for which they are in no way responsible. These inconveniences are incident to a situation which it is unfortunate the defendant is unable to relieve; but they cannot justify differences in rates which will force or tend to force the Providence dealers out of business.

As regards the Providence business we think the obligation of defendant is not different now from what it would have been had it constructed for its own convenience a branch road into some other part of the same city. If, for example, it had established a new freight station in Providence, in order that it might have more ample yards, and thus secure greater facilities for its business, it would not have been admissible that upon its shipments to points which were practically the same distance from each station, and accessible from each, a difference in rates should be charged when the service was worth no more to its customers, and when the reasons for having the two stations concerned its own convenience exclusively. But the establishment of a second station in this case, though in another municipality, and requiring several miles new line to reach it, was also in the nature of a

local convenience in its own business, and should be so considered in the making of rates to points reached from both stations.

Complainant insists that defendant should pay the cost of hauling the coal from the wharf to defendant's freight station in Providence. But we do not think this can be required. It seems that defendant did this formerly, but without any contract obligation to that effect; and, probably, only by way of encouraging complainant in building up a considerable trade. But what it did for a time as a favor or by way of encouragement, it might discontinue at pleasure. There could be nothing in the nature of a binding usage about it.

Our general conclusion is, that complainant is entitled to the relief indicated on the first two grounds of complaint above considered, but not on the third. Order will be entered accordingly.

In this opinion all concur.

THE TRADERS AND TRAVELERS' UNION *v.* THE PHILADELPHIA AND READING RAILROAD COMPANY AND OTHERS.

July 15 and July 25, 1887.

The Commission has no jurisdiction to compel railroad companies to make arrangements whereby commercial travelers or others will be allowed as passengers to take an extra allowance of baggage without extra charge, in consideration of some guaranty against liability.

The fact that contracts to that effect are outstanding will not give the Commission authority to compel their observance; the power to do so not having been conferred upon the Commission by statute.

Abel Crook, L. A. Burritt and R. P. Hoyt, for complainant.

F. J. Gowen, A. H. O'Brien, H. S. Drinker and F. H. Janvier, for defendants.

REPORT AND OPINION OF COMMISSION.

BRAGG, *Commissioner* :

The petition in this proceeding was filed on the 21st day of May, 1887. It avers that the petitioner was incorporated

under the general laws of the State of New York in the year 1884. That the object and purpose of the corporation is to provide for the loss or injury to baggage by creating a contingent fund for that purpose, known as the Traders and Travelers' Indemnity Fund, and by means of registration to prevent the loss of baggage, or in case of its loss to provide means for tracing it more quickly and with less difficulty than exists under the system commonly in use among the railroads. It avers that the petitioner contracted with the International Baggage Register Company for the purpose of providing for a certain protection against loss of baggage covered by said indemnity fund, and that this registry system is of great value to the railroads of the United States. It avers that the railroads have been asked to grant an additional allowance of one hundred and fifty pounds of free baggage for passengers, covering their baggage with a registry and indemnity certificate issued by the Traders and Travelers' Union, which releases the railroads from all liability for loss or injury to such baggage. That the benefits to railroads from such registration are the release from all responsibility for loss or injury to baggage covered by the indemnity insurance, as secured for the railroads through a contract made by the railroads with the petitioner, and the increase of their business; that such an arrangement was made in January, 1886, between the Lehigh Valley Railroad Company and the Philadelphia and Reading Railroad Company; that in consequence of these arrangements, many travelers have covered their baggage with indemnity certificates of the petitioner in order to secure the additional allowance of free baggage. That the issue of these indemnity certificates is not, and has not been, confined to any one or more classes of travelers, but is, and has been, open to all who desire to avail themselves of their advantages. That on March 26th, 1887, the Philadelphia and Reading Railroad Company notified petitioner that it would refuse to honor any indemnity certificates issued after April 1st, 1887; but that all certificates issued prior to receipt of the notice would be honored until they expired; that the issue of such notice was caused by the Philadelphia and Reading Railroad Company's interpreta-

tion of the act entitled "An Act to Regulate Commerce;" that the Philadelphia and Reading Railroad Company intended to honor the certificates issued prior to April 1st, 1887, and instructed its baggagemen so to do. That the Lehigh Valley Railroad Company has discontinued its arrangement with the petitioner, and has instructed its baggagemen not to honor indemnity certificates issued prior to April 1st, 1887; that the Lehigh Valley Railroad Company discontinued this arrangement in consequence of the belief that its continuance is prohibited by the act entitled "An Act to Regulate Commerce." That on April 11th, 1887, the petitioner requested the Interstate Commerce Commission to interpret the law on this subject; that on or about April 30th, 1887, the Lehigh Valley Railroad Company filed a petition against the Philadelphia and Reading Railroad Company for the purpose of securing an interpretation of the law on this point. That on May 11th, 1887, petitioner was notified by the Philadelphia and Reading Railroad Company that it would refuse to recognize the indemnity certificates issued prior to April 1st, 1887. That this action taken by the Philadelphia and Reading Railroad Company was to induce the Lehigh Valley Railroad Company to withdraw its complaint against the Philadelphia and Reading Railroad Company, so as to prevent an interpretation of the law by the Interstate Commerce Commission.

That the Philadelphia and Reading Railroad Company requested the Lehigh Valley Railroad Company to withdraw this complaint; that such withdrawal would still leave the question in suspense; and that such withdrawal will prove injurious to the interest of the petitioner and others; that there are now in existence a number of baggage indemnity certificates that will not expire until various dates between now and March 24th, 1888, and that the result of the refusal to recognize such certificates on the part of the Philadelphia and Reading Railroad Company and the Lehigh Valley Railroad Company, will cause serious injury to holders of such certificates and to the interests of petitioner.

On the 10th of June, 1887, each of the defendants filed its answer to the complaint.

In its answer, the Philadelphia and Reading Railroad Company admits the incorporation of the petitioner and the objects of that incorporation as stated in the petition; and that the petitioner has created a contingent fund known as the Traders and Travelers' Baggage Indemnity Fund; and that on or about November, 1885, petitioner entered into a contract with the National Baggage Registry and Manufacturing Company mentioned in its petition, to act as its agent; and also that the railroads of the United States had been requested by the petitioner to co-operate with it, and to grant an additional free allowance of one hundred and fifty pounds of baggage to each passenger who participated in the indemnity fund, provided for loss or injury to baggage, and who should file with the petitioner a power of attorney granting a release to all railroads and transportation lines, contracting with petitioner for free baggage to the extent of one hundred and fifty pounds over the ordinary allowance, on the presentation of the baggage indemnity certificate of the Traders and Travelers' Union. It further admits that the consideration for such action on the part of the railroads was the continuance of the registration and release of the responsibility for the loss or injury to such baggage through the contract thus made. It does not admit that the registry system, mentioned in the petitioner's complaint, is one that is of great value to the railroads of the United States, and that it enables them to identify the passenger with his baggage, and in various ways prevents irregularities, and increases the efficiency and revenue of their baggage department. It does not admit that in consequence of the alleged arrangement between petitioner and defendants, that many travelers in various parts of the country have availed themselves of its advantages and have covered their baggage with the indemnity certificates of the petitioner in order to secure the additional free allowance of one hundred and fifty pounds of baggage. It does not admit that the advantages claimed by the petitioner have not been confined or restricted to any one class of travelers, or to the members of any one or more organizations, or that they have been open to all who desired to avail themselves of the same. It does admit that

on April 11th, 1887, petitioner addressed a communication to the Interstate Commerce Commission requesting an interpretation of the law, and that the Commission replied that no decision could be given without an actual case in controversy.

It admits that the arrangement claimed in the petition was made by the petitioner with the Lehigh Valley Railroad Company by its leased lines in January, 1886; and it admits that the Lehigh Valley Railroad Company issued a circular dated April 1st, 1887, in which its agents were instructed to allow but one hundred and fifty pounds of free baggage under any conditions. It does not admit that the Lehigh Valley Railroad Company claims that its discontinuance of that arrangement is caused entirely by the belief that its continuance is prohibited by the act entitled an Act to regulate Commerce. It admits that the arrangement claimed to have been made in the petition by and between the petitioner and the Philadelphia and Reading Railroad Company and its leased lines, as stated in circular No. 40 dated January 13th, 1886, was made by or with the Philadelphia and Reading Railroad Company, but avers that it was made with the receivers of that company, and further avers that it was never consummated by any contract or agreement in writing between the parties thereto, but also avers that its continuance for any definite period of time was never agreed upon. It denies that the Philadelphia and Reading Railroad Company, on the 26th day of March, 1887, notified petitioner that it would refuse to honor any indemnity certificate issued after April 1st, 1887, but that all certificates issued prior to the receipt of such notice should be honored until they expired, but states that this notice was issued by the receiver of the Philadelphia and Reading Railroad Company, and that it believes that this was due to the belief of such receiver that the honoring of indemnity certificates was contrary to the provisions of the act of Congress referred to, known as the Interstate Commerce Law. It admits the filing of a petition to the Interstate Commerce Commission by the Lehigh Valley Railroad Company as charged in the complaint. It admits that the Philadelphia and Reading Railroad Company requested the Lehigh Valley Railroad Company to withdraw

its petition from before the Interstate Commerce Commission, but says that it was not notified as to what the object of the petition was, and denies that in making such request of the Lehigh Valley Railroad Company to withdraw said petition from before the Interstate Commerce Commission, it intended to prevent an interpretation of the law upon the point raised by that complaint.

It admits that the withdrawal of the petition of the Lehigh Valley Railroad Company will still leave the question to be determined in suspense. It does not admit that such withdrawal of the petition of the Lehigh Valley Railroad Company from before the Interstate Commerce Commission would prove injurious to the interests of the petitioner, or injurious to the interests of the general public concerned in the question; and it does not admit that there are now in existence a number of baggage indemnity certificates that will not expire until various dates between now and March 24th, 1888, and that the result of a refusal to recognize these certificates on the part of the Philadelphia and Reading Railroad Company and the Lehigh Valley Railroad Company, will be the cause of serious injury to the interests of those holding such certificates, as well as to the interests of the petitioner, and may render petitioner liable to action and litigation by the holders of such certificates claiming breach of performance of the conditions thereof.

The answer of the Lehigh Valley Railroad Company admits the incorporation of the petitioner as alleged in the petition, the objects of its incorporation, the creation of the contingent fund, known as the Traders and Travelers' Baggage Indemnity Fund, and the contract between the petitioner and the National Registry and Manufacturing Company to act as its agents, made about November, 1885, as alleged in the petition. It further admits, as alleged in the petition, that the railroads of the United States have been requested by the petitioner to co-operate with it, and to induce the registration and indemnification of baggage and granting an additional free allowance of 150 pounds of baggage to each passenger as alleged in the petition. It further admits that the consideration for such action on the part of the railroads,

is the registration and release of responsibility for the loss or injury to such baggage through the contract made with petitioner. It neither admits nor denies the averments of the petition in relation to the great value of the registry system to the railroads of the United States; or that many travellers in various parts of the country have availed themselves of its advantages and covered their baggage with the indemnity certificates of the petitioner, in order to secure the additional free allowance of 150 pounds of baggage; or that such advantages as are afforded by it have not been confined or restricted to any one or more classes of travelers, or to members of any one or more organizations, but are and have been open to all who desired to avail themselves of the same. It admits that on January 15th, 1886, it issued circular No. fourteen of that date, which amongst other things recognized the certificates of the petitioner for free baggage to the extent of 300 pounds, but says that the arrangement with petitioner, in consequence of which the circular was issued, was a verbal one between certain officers or agents of that company, and was not for any specific duration or term, and denies that the alleged printed contract marked "D," attached to the petition, was executed by the defendant. It admits that on the 26th of March, 1887, the Philadelphia and Reading Railroad Company notified petitioner that it would refuse to honor any indemnity certificates issued after April 1st, 1887, but would honor all certificates issued prior to the receipt of such notice until they expired, but does not admit that this action was taken on the part of the Philadelphia and Reading Railroad Company on account alone of its interpretation of the statute entitled the Act to Regulate Commerce. It admits that the Lehigh Valley Railroad Company issued the circular mentioned in the petition instructing its agents to allow any passenger but 150 pounds of free baggage under any conditions, and says that it discontinued that arrangement with petitioner because it was advised that such arrangement should be discontinued in view of the act of Congress approved February 4th, 1887, entitled an Act to Regulate Commerce. It admits the filing of the petition of April 11th, 1887, to the Interstate Commerce Commission

by the petitioner as averred in the complaint. It admits, as charged in the complaint, the filing of petition by the Lehigh Valley Railroad Company to the Interstate Commission, and avers that after the filing of the petition the Philadelphia and Reading Railroad Company withdrew the privileges of holders of the indemnity certificates of the petitioner; that no answers was filed to said petition, and that it was withdrawn by E. B. Byington, the general passenger agent, by whom it was filed. It does not admit that such withdrawal of the petition would leave the question to be determined still in suspense, or that it will prove injurious to the interests of the petitioner in this complaint, and injurious to the interests of the general public concerned; or that there are in existence a number of baggage indemnity certificates of petitioner that will expire at various dates between now and March 24, 1888, or that the result of the refusal of the defendant to recognize the certificates will cause serious injury to those holding such certificates, as well as to the interests of the petitioner, and may render petitioner liable to action and litigation by holders of such certificates, claiming breach of performance of the conditions thereof. It asserts that the case stated by the petitioner does not come within the provisions of the act of Congress, entitled "An Act to Regulate Commerce," nor within the jurisdiction of the Commission thereby established, and prays that as to it said petition may be dismissed.

From admissions in the pleadings and from proofs before us, we find the facts material to the determination of this complaint to be, in substance, as follows:

In the year 1884 the Traders and Travelers' Union (Co-operative), of New York, was incorporated under the laws of the State of New York. One object of its incorporation, as specified in its charter, is to provide for injury to or loss of baggage, and for that purpose it has created a contingent fund, known as the Traders and Travelers' Baggage Indemnity Fund. On or about November, 1885, it entered into a contract with the National Registry and Manufacturing Company to act as its agents, and for the purpose of providing protection against loss of baggage covered by the said bag-

gage indemnity fund. This registry system is of value to railroads in enabling them to identify the passenger with his baggage, and in various ways to prevent irregularities, and to trace the baggage in case of loss, and it also holds the railroad company harmless for the loss of the baggage, by means of the indemnity fund mentioned. Many of the railroads of the United States, prior to the passage of the Interstate Commerce law, entered into this arrangement with the Traders and Travelers' Union. Among these were the Philadelphia and Reading Railroad Company and Lehigh Valley Railroad Company, each of which entered into such an arrangement in January, 1886. The terms of the arrangement provide that it is open to all who desire to avail themselves of it, and is not confined merely to classes of travelers, or to commercial men, or to members of any one or more organizations. By this arrangement, and in consideration of it, the railroad companies which very generally allowed, prior to that time, baggage free of charge to the amount of 150 pounds to each passenger, increased this allowance to 300 pounds of free baggage to each passenger availing himself of this arrangement.

After the enactment of the Interstate Commerce law the Philadelphia and Reading Railroad Company and the Lehigh Valley Railroad Company each discontinued this arrangement, on the ground that it was in conflict with the provisions of the law. Since the first of April, 1887, none of the railroad companies of the country have any arrangement with the Traders and Travelers' Union for the allowance of 300 pounds of free baggage as provided in these certificates, but have abandoned that arrangement and now allow only 150 pounds of baggage free to each passenger. The certificates mentioned provide for the transportation of baggage over the railroads upon the terms and conditions above indicated. A charge was made of \$3.20 per annum to each customer of the Traders and Travelers' Union. Two dollars of that amount went to the indemnity fund, and the item of twenty cents was for the rental of the plates used in the registration of the baggage. The Traders and Travelers' Union under that system gave insurance on property to

the estimated value of \$200 on each trunk, and in case of loss the passenger would have to prove his loss, the same as with any other insurance company, and could recover the amount actually lost not exceeding two hundred dollars on each trunk. This insurance covers loss by fire, collision, theft and, in fact, loss of every character, and releases the railroad company from all liability absolutely. The trunk thus registered has a plate riveted to it, and there is another trunk plate with a like number which certifies that this trunk belongs to the passenger. Checks or cards are given for these trunks, and a report of the trunks thus registered and checked is made by the baggage-master.

In all these facts, which we have carefully considered, there is nothing that involves any question of unjust discrimination or extortion, or any other matter of which we have any jurisdiction. If petitioner has contracts or business arrangements with defendants or others, by which large numbers of its certificates are outstanding in the hands of holders, and if in any of the matters related in this evidence it has been injured and wronged by the defendants, there are courts provided by law having jurisdiction to hear and determine controversies of that character. The power to enforce contracts is not one which has been confided to us. Nor have we any general power, or authority, to manage the business of carriers, but only a limited power, expressly defined by the statute, to interfere to prevent wrong and oppression in specified cases. Every ground of our jurisdiction, as defined by the statute, relates directly or indirectly to the transportation of persons and freight by carriers at fair and reasonable rates, and with absolute impartiality as to facilities and accommodations. In this proceeding, as in all others, we shall refrain from expressing opinions upon matters that are outside of our jurisdiction, and from entering into any discussion of them. As the evidence shows a case that is not within our jurisdiction, and upon which we can give no relief, the petition is dismissed.

In this opinion all concur.

BURTON STOCK CAR COMPANY v. CHICAGO, BURLINGTON AND QUINCY RAILROAD COMPANY AND OTHERS.

June 21, 22, 23 and July 25.

Complainant is manufacturer and owner of a patent stock car, designed for the transportation of cattle and other live stock in a less cruel way than they are now transported, and with less loss by shrinkage. It is customary for railroad companies to receive each other's cars as they find convenient in their business, and to pay a uniform mileage rate for the use thereof. They refuse to receive complainant's cars and pay a like rate. As complainant is not a carrier, and such an arrangement with it would not be reciprocal but one-sided, it is not unjust discrimination on their part to refuse to make it.

Whether the charge made by defendants for transporting the cars of complainant is excessive is left undecided; the evidence on that branch of the case being unsatisfactory.

B. F. Butler and C. E. Barker, for complainant.

Wirt Dexter, Wm. Brown, E. C. Perkins, Dillon, Swayne & Blair, Burton Hanson, G. C. Greene, S. Shellabarger, H. H. Poppleton, Young & Lightman, Strong & Mossman, and J. W. Carey, for the several defendants.

REPORT AND OPINION OF COMMISSION.

WALKER, Commissioner.

The above-entitled cause has been heard upon complaint, answers, and proofs. The Burton Stock Car Company complains against the Chicago, Burlington and Quincy Railway Company; Chicago and Alton Railway Company; Union Pacific Railway Company; Lake Shore and Michigan Southern Railway Company; Cleveland, Columbus, Cincinnati and Indianapolis Railway Company; Chicago, Burlington and Northern Railway Company; Hannibal and St. Joseph Railway Company; Missouri Pacific Railway Company; Chicago, Milwaukee and St. Paul Railway Company; and the Burlington and Missouri River Railway Company; alleging, in substance, that it owns a large number of cars designed for and adapted to the humane transportation of live stock, for the use of which over a hundred railroad companies pay complainant a mileage of three-quarters of

a cent per mile per car, which is alleged to be a customary mileage paid by all railroad companies for the use of cars of other railroad companies and owners of cars; while the defendants refuse to pay this mileage, and also demand for the transportation of live stock in the Burton cars a charge additional to the tariff rate for carrying live stock in ordinary cars, at the rate of 120 per cent. of said tariff rate on Burton cars thirty feet in length, increased three per cent. for each additional foot or fraction of a foot of length. The refusal to pay said mileage and said extra charge upon the live stock carried in the Burton cars are alleged to constitute unjust discrimination and extortion, forbidden by sections 1, 2, and 3 of the Act to Regulate Commerce.

There is no charge that the defendant companies or any of them refuse to receive and haul the complainant's cars, but the complaint is directed solely to the refusal to pay mileage and to the extra charge made shippers, as above stated.

The complaint concludes as follows:

"And said Burton Stock Car Company prays that it may be relieved from such unjust discrimination, and that said railroad companies may be enjoined and restrained from making any extortionate demands and charges, and that said railroad companies may be ordered to haul and operate the cars of the Burton Stock Car Company on the same terms and conditions as they operate their own and the cars of other railroads, individuals, and private companies, and that they may also be ordered to report and account to said Burton Stock Car Company for such mileage as has been earned in the past or may be earned in the future over the several lines referred to, by the cars of the said Burton Stock Car Company, and for such further relief as may be deemed just and proper by your honorable board."

The answer of the Chicago, Burlington and Quincy Railroad Company admits the payment of mileage, at the rate stated, to other roads and owners of cars for the use of their cars running on its lines, but says that the character of said cars and the conditions under which they are used are totally different from the cars of complainant and the condi-

tions of their operations ; so that the failure to pay a like mileage on the Burton cars is in no way a discrimination or an infraction of law. It sets forth the facts in detail which are alleged to constitute a difference in circumstances, and claims that the character of the Burton cars is such that they are not available for return freight and have to be hauled back empty, which fact is given as the reason for the additional charge made to shippers in those cars. And it says that all palace stock cars, similar to those of complainant, owned by it or other persons or corporations, are treated alike, no mileage being paid to any of them, and the same tariff being enforced ; and asserts that the payment of mileage to complainant would be a discrimination against the owners of like cars.

The answer of the Chicago, Rock Island, and Pacific Railroad Company is similar, stating facts more fully as to its ownership of cars sufficient to perform all requirements of transportation of live stock, and the method of interchange of cars among railroad companies. It says that prior to April 5th last five cents per mile was charged for hauling the Burton and other improved stock cars when empty, and that the present charge of an increased percentage on the contents of the car was understood to be made at the desire of the complainant in place of the former charge for hauling back empty cars.

The answer of the Union Pacific Railroad Company, among other things, submits that it is not under any legal obligation, either at common law or by statute, to receive and transport over its road the trains, cars, and vehicles of private parties and corporations not operating railroads and not exchanging passenger, freight, or other cars as common carriers.

The answer of the Lake Shore and Michigan Southern Railroad Company, among other things, denies that it is under any obligation whatever to employ, receive, transport, or haul said petitioner's cars and pay said complainant compensation or mileage therefor ; that it owes complainant no duty or obligation to use or employ its cars ; that complainant is not a shipper of live stock, but merely the owner of

certain cars which it seeks to compel defendant to hire and use in place of suitable and proper cars which defendant now owns, and claims the right to select its own agencies, means, and equipment for transacting its own business.

The answer of the Cleveland, Columbus, Cincinnati and Indianapolis Railway Company also denies that it owes any duty to complainant or to any private corporation to receive or haul its cars in the absence of a special contract to do so; that it has the right to select cars as it pleases, and exclude all others for which similar advantages are claimed, and to make exclusive agreements to that end.

The other answers are similar in effect, and need not be noticed in detail.

The facts found by the Commission are as follows :

The complainant is one of several corporations which own cars fitted up especially for the transportation of live stock, and lease them to shippers for that purpose. There is an increasing public demand for cars of this character. The chief advantage claimed for such cars is in the fact that live stock can be fed and watered while the train is moving, avoiding the evils attendant upon unloading at stock-yards for that purpose from time to time during the trip, which is required by the Revised Statutes of the United States, sections 4386-4390, in case of cattle carried in ordinary cattle-cars. In complainant's cars the cattle also stand side by side, partially separated from each other while in transit. The Burton cars have been in use since 1883. Eighty-six are now running and one hundred more building. Some of the devices embraced in their construction are protected by patents which the complainant owns. The Burton cars are of various lengths, viz., 34, 36, 38, and 42 feet. They have been built as long as 46.6 and 51 feet, but no more of these lengths are now contemplated. Ordinary cattle-cars were formerly 28 and 30 feet long. There is a tendency of late to increase their length to 34 feet, in order to enable them to carry two lengths of 16-foot lumber, and many of them now are 30 feet and over. Some of the defendant companies own more than 5,000 cattle-cars each, all of the ordinary construction, as to which no substantial change has been made

during the last twenty years except in improved running-gear and adaptation for the carriage of other kinds of freight. The Burton cars carry 16 cattle each, and are equipped with a room in the center for a drover, with bunk, etc.; also a large receptacle underneath for carrying hay and grain. The ordinary cattle-cars carry from 19 to 23 cattle at a load, 20 or 21 being a fair average load. The Burton cars are somewhat heavier than the ordinary cars, but not materially heavier when loaded. They are well built and safe cars, and can be hauled in any ordinary freight train. They are owned by complainant company, which rents them to shippers at the uniform rate of $2\frac{1}{2}$ cents per mile run. The shippers pay the railroad charges in addition.

Railroad companies exchange cars with each other at a uniform rate of $\frac{3}{4}$ of a cent per mile run, paid upon the balance of mileage for or against each company, as adjusted periodically. Some railroad companies, about one hundred, as stated by complainant's treasurer, treat the cars of the Burton Stock Car Company in the same manner as the cars of other roads so far as the payment of $\frac{3}{4}$ of a cent per mile car service is concerned; these roads are chiefly in the East. All of the defendant roads refuse to pay anything to complainant by way of car service. Prior to April 5th, 1887, most of the defendant roads charged five cents per mile for hauling special cattle cars when empty, and when loaded the ordinary rates to the shipper of the stock. All loaded cattle cars are charged for at the estimated average weight of the ordinary car load, so that 16 cattle in a Burton car pay the same freight as 20 or 21 cattle in an ordinary car.

On April 5th, 1887, a revised classification was put in force by the Western Classification Committee, acting for an association of which all the defendants except the Lake Shore and Michigan Southern Railroad Company and the Cleveland, Columbus, Cincinnati, and Indianapolis Railroad Company are members, in which the following rule appears:

“Live stock in car loads, carrier's risk, class 2.

“NOTE.—Live stock transported in special or palace live-stock cars, not the property of railway companies, will be charged as follows: In cars not exceeding 30 feet in length,

internal measurement, 120 per cent. of tariff rates ; for each additional foot or fraction thereof in excess of 30 feet in length, internal measurement, an additional charge of 3 per cent. per foot, or fraction thereof, will be made.

For example, live stock in a palace car 36 feet in length, internal measurement, will be charged 138 per cent. of tariff rate ; live stock in a palace car 40 feet in length, internal measurement, will be charged 150 per cent of tariff rate. It being optional with any railway company to receive car exceeding 34 feet in length."

This rule is still in force. The Chicago and Alton Railroad Company did not accept the Western classification in this respect, but provided by a circular dated May 20, 1887, for a charge of 5 cents per mile on empty cars, and for ordinary tariff rates on cattle in special cars of 30 feet in length; over 30 and not exceeding 33 feet, 10 per cent, additional; and a further charge of 3 per cent. for each foot or fraction thereof, above 33 feet.

The extra charge to shippers in the Western classification, above quoted was intended to be in lieu of the former charge of 5 cents per mile for hauling back empty cars, and was adopted after a suggestion of one of the officials of complainant to the effect that the public objected to paying tariff rates and 5 cents additional mileage for the empty cars, and that it would be better to put it in the form of a percentage on the tariff. The Commission do not understand, however, that complainant thereby acceded to the justice of either charge, but merely that it preferred the one method to the other in case an additional charge was to be enforced.

The traffic in live stock upon the roads leading from the West to Kansas City, Chicago, and St. Louis is almost wholly East-bound, the West-bound shipments being chiefly of fine stock for breeding purposes. It is a matter of material importance to the railroads to be able to get return loads upon cattle cars going back from those cities to the West. The chief opportunities for back loading are found in lumber, steel rails, and ties. Lumber cannot conveniently be loaded in the Burton cars. Steel rails, also, cannot be taken upon those cars, but are at times loaded in ordinary cattle cars

through doors placed at the ends for that purpose. Practically the special stock cars are not available for back loading to any considerable extent upon the roads of the defendant companies.

Upon the foregoing facts one question largely discussed by counsel was as to whether a railroad company is by law required to accept for transportation the cars of complainant, and whether the Commission has authority to direct such cars to be so accepted when tendered in good order, properly constructed, mechanically correct, and loaded with live stock.

It was argued by defendants that a railroad company is not bound to accept all cars and other instrumentalities of traffic offered it, but, on the other hand, is required by the law to provide for itself all equipment necessary for the transaction of its business, and, having done this, has performed its duty to the public; and also that the "Act to Regulate Commerce" contains no suggestion of a power in the Commission to decide upon the quality or fitness of the equipment of railroad companies. It is apparently conceded that the general subject of the safe and proper operation of railroads is within the power of State legislatures and of Congress to regulate within their respective spheres of jurisdiction; a large part of the duties conferred upon some of the existing State railroad commissions is in the supervision of such matters, extending to the safety of bridges and roadway as well as of rolling stock and other instrumentalities and conveniences used in transporting persons and property. But it is claimed that the supervision of interstate commerce in these respects was not contemplated by Congress in the act under which the Commission is organized, and that no powers have been conferred upon the Commission in that behalf; that the act regulates the transportation of property, which is called commerce, but that the subject of procuring adequate means for the transaction of the business of transportation is not commerce, and is not within the jurisdiction of the Commission.

On the other hand the complainant insists that the only way to regulate commerce is by regulating the instrumental-

ities of commerce, which necessarily includes power to regulate the cars, bridges, heating apparatus, and all other means and appliances by the use of which interstate commerce is carried on.

The complaint, however, does not allege a refusal by the defendants or any of them to accept and haul complainants' cars, and the evidence does not disclose any such refusal. On the contrary, the evidence clearly shows that most of the defendants publicly announce the terms on which live stock offered for transportation in special cars will be received and transported. For these reasons it is apparent that the question whether the defendants are bound to receive complainants' cars is not presented, nor the question whether the act confers jurisdiction upon the Commission over the instrumentalities of commerce; and no opinion is expressed upon those questions.

In view of the general demand among intelligent shippers for more satisfactory although more expensive conveniences for the safe and rapid transportation of live stock, it is scarcely conceivable that any railroad company will deliberately exclude from its lines the improved stock cars which modern invention has introduced, and which are recognized in the official tariffs and classifications of the carriers.

The question presented by the complaint, and the only question properly to be decided here, is whether the terms upon which the defendants take the special stock-cars are just and reasonable. This question divides itself into two branches:

First. Should the defendants be required to pay three-fourths of a cent per mile run to the complainant by way of car service?

Second. Is the tariff rate charged shippers for transportation of live stock in special stock-cars a just and reasonable rate?

Upon the first question it is admitted that the defendant carriers refused to pay to the complainant mileage upon the distance run by complainant's cars over their roads. This refusal is claimed to be an unjust discrimination against the complainant.

As is well known, freight cars belonging to the different railroad companies throughout the land are, to a large extent, used interchangeably. A record of their mileage when away from home is made the basis of the payment of "car service" at the rate of three-fourths of a cent per mile. Of course, if the cars of a carrier are used as much away from home as it uses the cars of other roads on its line, the monthly payments for car service will be offset by the amounts received. This is theoretically the nature of the transaction, a matter of mutual convenience which costs neither party anything. The payments and receipts in any one month could not be expected to exactly balance, but if each road has cars sufficient for its use, the result in the long run will be very nearly equalized. In view of this fact it is obvious that no great importance attends the making this payment an exact compensation for the use of the cars, and it would not be fair to make it the measure of payment required to be made for the use of cars hired from other persons.

The Burton Stock Car Company does not receive and use the cars belonging to other carriers and there is no possible mutuality in this respect, such as exists between carriers exchanging cars in the ordinary way. The Burton Stock Car Company is in no sense a "connecting line," entitled to equal facilities for interchange of traffic under the provisions of the second paragraph of section three of the "Act to Regulate Commerce." Its counsel insists that it is not a common carrier. When freight is tendered to defendants in loaded cars by other carriers they have the option to take the car or to reload the freight into their own cars, and the latter course is often pursued when the cost of unloading is less than the car service for the proposed trip. The fact that carriers interchange cars with one another in the manner and on the terms above stated does not entitle the complainant to claim that it is unjustly discriminated against, by a refusal to pay it the same rate which carriers adopt as the basis in adjusting their car service accounts with each other. The claim of the Burton Car Company for payment by the railroad companies for the use of their cars is matter of contract and agreement between the parties, so far as the proofs

before us show, which does not present the feature of unjust discrimination. It seems that some carriers find the use of Burton cars, or of other improved stock cars, to be a service desired and demanded by the public, and are willing to concede to the complainant a reasonable payment for such use. So long as the carriers have no like cars in their own equipment, upon which live stock can be watered and fed without unloading, there is apparent justice in making such compensation. But complainant, which charges and receives from the public two and a half cents per mile for the use of its cars, is not in a position which entitles it to demand an additional payment of three-fourths of a cent per mile from the carrier upon the ground that the carriers pay that sum to each other upon exchanging cars under the circumstances above stated, and that their refusal to pay the same sum to complainant is an unjust discrimination. Nor is any ground apparent upon which such a payment can be ordered by this Commission.

The other ground of complaint is that the charge made to shippers of live stock by the Burton cars is too high.

The extra charge provided for in the western classification is justified by the carriers upon the ground that the cars have to be taken empty to the point where they are to be loaded, or returned empty from the point where they are unloaded, while ordinary cattle cars are more susceptible of being loaded in both directions and are often so loaded in fact. This was explained in detail in respect to the Chicago, Burlington and Quincy railroad, upon which a large proportion of the railroad company's cattle cars are used in both directions.

It appears to the Commission that the expense of hauling complainant's cars in one direction unloaded, as compared with the greater ability to load back the ordinary cattle cars in use by the defendants, and the fact that a large percentage of the ordinary cattle cars are so back-loaded upon the long hauls of the western roads is a consideration which justifies a difference in charge against shippers who prefer to hire the improved stock cars for the transportation of their live stock.

The fact that cattle are transported in better condition and

with less shrinkage in the special cars, and on that account are worth more at the end of the journey, is not a reason which the carriers can properly make use of as justifying an increased charge. It is in view of this fact that the shippers pay $2\frac{1}{2}$ cents per mile to complainant for the use of its cars; and the legal duties of carriers in respect to all property which they accept for transportation cannot be forgotten.

Nor is the fact that these special stock cars are chiefly used for higher grades of stock a proper ground for additional charge, based upon the kind of car employed in the service. The car is the same, whether used for Morgan horses or Texas steers. Any addition to the transportation, based upon the value of the article carried, is, in part at least, in the nature of an insurance premium paid for the risk, and should be applied to the articles themselves, and not to the vehicles in which they are transported. This is recognized in the amended classification recently filed with the Commission by the Joint Committee of the Trunk Lines, in which a maximum value is given upon which the tariff rates are based, and the terms upon which added liability will be assumed for live stock of more than ordinary value are stated in detail. To place an additional burden upon all live stock carried in special stock cars upon the ground that such cars are often used for fine stock having high value is obviously unreasonable.

But the question remains whether the additional percentages provided for in the classification constitute a just and reasonable charge to shippers, in consideration of the single fact that the special stock cars are usually hauled empty in one direction. The effect of this charge was explained in detail by the general manager of the Chicago, Burlington and Quincy railroad as follows:—"The rate for a car load of cattle from the Missouri river is seventy dollars for a thirty-foot car. If sent in a Burton car, a thirty-foot car, the charge would be seventy dollars plus twenty per cent.; that is four-dollars, making eighty-four dollars. Now, that fourteen dollars we have on the circular compensates us for hauling the car empty from Chicago to the Missouri river, a distance of five hundred miles, and fourteen dollars divided by five hun-

dred is the rate per mile we charge for hauling the car out. It is a fraction less than three cents per mile."

This is apparently a reasonable explanation; but other facts, which appear by the testimony before us, should be also noted. As before stated the shipper pays the full car load rate, whatever be the number of cattle in the car; thus, 160 cattle at the Missouri river shipped in Burton cars would make 10 car loads, at 16 head per car, for which the carrier would receive \$700 freight money, at \$70 per car. The same 160 cattle shipped in ordinary cars would make but 8 car loads, at 20 head per car, for which the carrier would receive on the same basis \$560 only. The difference of \$140 is the precise amount, according to the witness, which compensates the company for hauling 10 cars empty from Chicago to the Missouri river, at \$14 per car. In other words, the railroad companies apparently receive about 25 per cent. more for hauling the same number of cattle in the Burton cars than in the common cars.

It is true that the ten loaded Burton cars weigh somewhat more than the eight loaded common cars. It is also true that the case stated by the witness, quoted above, showing an extra charge of only fourteen dollars per car, was not quite fair, for the reason that the Burton cars are more than thirty feet in length. In the case of a Burton car thirty-four feet in length the extra charge on the haul stated would be \$22.40; thirty-six feet, \$26.60; thirty-eight feet, \$30.80; forty-two feet, \$39.20. If fourteen dollars, or less than three cents per mile, be a fair charge for hauling a thirty-foot empty car from Chicago to the Missouri river, certainly \$39.20, or nearly eight cents per mile, is too much for a thirty-two foot car. Still there is some increased expense connected with the increased length and weight of the longer cars; and on the other side, again, we have the apparent fact that the use of the special cars saves a certain amount of wear and tear that would otherwise occur to the cars of the carrier, not an inconsiderable item in a run out and back of a thousand miles. And still again, the carriers urge that when the special stock cars are in use their own equipment is idle to a corresponding extent, and the investment which they represent is unproductive.

The case was not presented to the Commission with satisfactory precision upon this question by either party. The force of the contest was expended on the other points. It is not improbable that other pertinent considerations may exist, mention of which was not made in the evidence, and which have not occurred to the Commission. It was distinctly stated by the complainant's counsel that the object of this proceeding was not to obtain damages for past overcharges, but to obtain a settled and reasonable rule for future service. We therefore do not now put upon record a finding that the charges last above stated are unreasonable, although we are strongly impressed with the belief that such may be the case. These suggestions are commended to the immediate attention of the Western Classification Committee, and the case is retained by the Commission for future consideration upon the last above question.

In this opinion all concur.

ADOLPH OTTINGER *v.* THE SOUTHERN PACIFIC RAILROAD COMPANY.

July 23, 1887.

A complaint for unjust discrimination under the Act to Regulate Commerce cannot be made to embrace cases which occurred before the Act was passed, even though they be similar to one which is complained of, and which arose afterwards.

The Commission has a certain discretion to receive and adjudge complaints made by parties who have no interest in the matter involved. But where "a railroad ticket broker" complained that a party holding a ticket not transferable by its terms, had been refused a permission of transfer which was given to another, and produced the affidavit of such party in proof of the fact, it was held that the party himself should complain if any one.

A *prima facie* case of unjust discrimination is not shown by the mere exhibition of two tickets for passage, one of which the railroad company has permitted to be transferred and the other not, when the two do not appear to be similar.

The complainant who represents himself as a railroad ticket broker doing business at San Francisco in the State of

California, complains of the Southern Pacific Railroad Company for unjust discrimination, in violation of sections two and three of the Act to Regulate Commerce. The facts upon which the complaint arises are in substance stated as follows: That on June 3, 1887, one Mrs. T. M. Randolph was owner of the return portion of a first-class railroad ticket over said railroad, of which a photographic copy is given in the petition, which said ticket was permitted to be sold by said Randolph to another person, through and by virtue of the authority of said Southern Pacific Railroad Company, through its authorized agent, T. H. Goodman, the General Ticket and Passenger Agent of said company, who indorsed on the reverse side of said ticket the following: "Good for passage of Mrs. Sherwood if accompanying Mrs. Randolph. T. H. Goodman, G. P. & T. A." That on June 17, 1887, one August G. Rommel was the owner of a similar ticket, of which a copy is also given, and applied to said agent for the same and like privilege granted to said Randolph, but said company through said agent refused it. It is further stated that said Rommel desires to sell his said ticket, and his affidavit in support of the facts is appended to the petition. The complaint further avers that within two years next last past one hundred and seventy-five tickets of similar character, sold by complainant to be used for passage over said railroad, have been, when offered on the cars, seized and destroyed, to his great injury, for which he demands damages:

The Randolph ticket, as shown in the complaint, was a ticket good for a return over one specified route if used within thirty days. The return part of the Rommel ticket entitled the purchaser to choose one of four routes, and to have a ticket issued in pursuance of the choice; and it did not appear that the route of return had been selected, nor had the return ticket been obtained when the privilege of transfer was demanded.

WALKER, *Commissioner*, addressing the petitioner's attorney by letter, said:

The complaint in the case of *Adolph Ottinger v. The South-*

ern Pacific Company was duly received, and has been considered attentively by the Commission. It is returned with the following suggestions :

The allegations commencing with the words "That the said plaintiff within the two years next last past" (referring to 175 tickets alleged to have been purchased and sold by complainant, which were seized when presented for passage) should be expunged, as the subject matter thereof does not appear to be within the jurisdiction of the Commission. The Act to Regulate Commerce does not afford a remedy for transactions which occurred before it took effect. And the transaction with Mrs. Randolph is stated as having occurred on June 3d, 1887. If the case stated respecting the 175 alleged tickets was the same, there would be no grounds to claim a preference under the law as to transactions prior to that date. The case stated, however, is not the same, and upon several grounds no *prima facie* case as to those tickets is presented.

As to the Rommel tickets the Commission prefers that, if Mr. Rommel has a grievance, he should present it in his own name. His affidavit is annexed to the petition, but the complaint is made by a party having no apparent interest in the transaction. The Commission is given by the law a certain discretion in reference to its investigations, and it has so many actual controversies pending that it cannot enter upon the investigation of moot cases. A reasonable evidence of good faith in the present case would seem to be the complaint of the party said to be injured.

It is proper to say further that the Randolph ticket is uncanceled, and the time for its use has expired. It does not appear that the transferee, Mrs. Sherwood, was in fact transported on it, but only that Mr. Goodman endorsed it as "good" for her passage "if accompanying Mrs. Randolph." This was apparently an act of courtesy which the party did not see fit to make use of.

Nor are the Rommel tickets similar in form to the Randolph tickets. They have not reached the same stage. As they stand they are good over four routes, and no selection has been made or return ticket issued.

LOUIS LARRISON v. THE CHICAGO AND GRAND
TRUNK RAILWAY COMPANY.

THE MICHIGAN CENTRAL RAILROAD COMPANY v.
THE SAME DEFENDANT.

Tried June 15th, 1887.—Decided July 25, 1887.

A railroad company that sells mileage tickets must sell them impartially to all the public who apply for them. It is not competent to sell them to a particular class of persons, *e. g.*, commercial travelers, at lower rates than are charged to others.

The provision in the twenty-second section of the Act to Regulate Commerce, that nothing therein shall apply to "the issuance of mileage, excursion or commutation passenger tickets," while fully authorizing the issuance of such tickets, does not relieve the carriers as to rates charged from the requirements of reasonableness and impartiality, which are prescribed in respect to rates in other parts of the Act.

The fact that in the mileage tickets sold to commercial travelers a special contract is inserted limiting the liability of the carrier will not justify a lower rate to such commercial travelers than is charged the public, where the offer of such lower rate is not made to all who will accept such special contract.

The fact that commercial travelers by their travel are supposed to create freight traffic for the roads is no reason for giving them special rates as passengers.

Ashley Pond, for complainants.

E. W. Meddaugh, for defendant.

REPORT AND OPINION OF THE COMMISSION.

MORRISON, *Commissioner* :

In one of these cases the complainant, Louis Larrison, alleges unjust discrimination and neglect to publish fares, rates and charges for mileage tickets ; in the other, unjust discrimination is alleged. The two cases were, with consent of the parties, heard together, and, after investigation the facts are found to be as follows :

The defendant, being the same in both cases, is and was, on the 21st of May, 1887, a common carrier of passengers on its railroad from Port Huron, in the State of Michigan, into and through the State of Indiana to the city of Chicago, in the State of Illinois, and was then offering to sell and

selling, for twenty dollars, to the class of persons known as commercial travellers, mileage tickets, entitling the holder to transportation to the extent of one thousand miles over its road between said States.

The complainant, Larrison, having occasion to travel on defendant's road between said States, applied on the 21st of May, 1887, at the proper office of the defendant in the city of Detroit, to purchase one of said "thousand mile tickets" offering in payment therefor the sum of twenty dollars. The defendant refused to sell this complainant such tickets for less than twenty-five dollars, alleging as a reason therefor, as was the fact, that complainant, Larrison, did not belong to the class of persons known as commercial travellers to which alone the defendant sold said tickets for the price of twenty dollars.

The schedule of defendant, kept in its office in said city of Detroit, purporting to show the rates, fares and charges it had established, and which were in force May 21, 1887, did not show the rates, fares and charges which it had established and were in force for carrying passengers who purchased mileage tickets which it then kept and was offering for sale; but since this complaint was made defendant has caused its schedules of rates, fares and charges, to be so amended as to show the rates at which it sells mileage tickets.

The other complainant, the Michigan Central Railroad Company, owns and operates a railroad extending from the city of Detroit, in the State of Michigan, into and through the State of Indiana, to Chicago, in the State of Illinois, and is a common carrier of passengers between said States, and, while the defendant was offering to sell and selling to commercial travelers thousand mile tickets for twenty dollars and refusing to sell for less than twenty-five dollars like tickets to persons not commercial travelers, this complainant was selling such thousand mile tickets for twenty-five dollars to the public generally, without discrimination in favor of any person or class of persons. And as such common carrier of passengers between said States, this complainant and the defendant are competitors.

The answer of defendant admits the facts as found above,

but avers that nothing alleged against the defendant company is in conflict with the "Act to Regulate Commerce," because at the date of the passage of said act, the railway companies of the country generally, including the defendant and the complainant companies, were and for many years prior thereto had been doing the things now complained of; and further because, as defendant alleges, "the provisions of the Interstate Commerce Law do not apply to such mileage tickets, nor, in any respect, affect the sale thereof."

The sale of mileage tickets at lower rates to one person than to another, by railroad companies generally, might well have been lawful before, and be unlawful after the passage of said law. Nor is the fact that discriminations in the sale of tickets were so made, conclusive testimony that they had the sanction of law. Most of the provisions of the Interstate Act but re-enact the common law and supply some new, while saving all the old remedies. For unlawful discriminations or other wrongs done by common carriers now subject to the recent act, the courts, before the act, afforded the only remedy. In view of remedies so to be obtained and necessarily with much cost, great inconvenience and some vexatious delays, it could be, and no doubt it is true, that discriminations against travelers, to the extent now complained of, might then have been illegal and yet go unchallenged.

It is not important whether, in any view of this case, it might be necessary to pass upon the State of the law before the passage of the Act, which is not material as the case is presented.

It was made apparent in the argument, that the defendant in averring "the provisions of the Interstate Commerce Law, do not apply to such mileage tickets, nor in any respect, affect the sale thereof," intended to and did, question the jurisdiction of this Commission, resting the averment on the twenty-second section of the act.

That section is in the nature of a proviso, saving out or excepting some things not intended to be embraced in the provisions of the act, and qualifying or restraining its generality as to others.

The language of so much of the section as the defendant relies upon to include mileage tickets among the things taken

out of the act, is "that nothing in this act shall apply to the issuance of mileage, excursion, or commutation passenger tickets," and includes excursion and commutation with mileage tickets.

The most usual form of mileage tickets is the one thousand mile ticket, but the custom has been to issue them in other and various forms, and they may be issued for any given number of miles. There is no uniform usage fixing the form of excursion or commutation tickets, or prescribing the extent to which they may be issued. The extent to which traveling may be done on these three forms of tickets is without limit. They can be used in and extended to the entire passenger traffic, or nearly one-third of the railroad business of the country. The first three sections of the Act require all passengers to be carried for reasonable rates of fare, without undue preference or unjust discrimination. The construction contended for by the defendant, would take out of these sections all that relates to passengers, because all may ride on tickets to which, defendant insists, the act does not apply. In effect this would be saying, that, so far as the "Act to Regulate Commerce" provides, charges for carrying passengers need not be reasonable and just, nor without unreasonable preference, nor free from unjust discrimination. Certainly nothing so contradictory as such interpretation leads to, was intended by the Congress. The body or enacting part of the statute is generally considered as more clearly expressing what is intended than the saving clause. The language of so much of the twenty-second section as relates to mileage tickets is perfectly satisfied by confining its operation to the issuance, or the act of issuing, or giving out such tickets. It is to this issuing or giving out, the Act to Regulate Commerce does not apply or prevent, while the terms, conditions and circumstances, upon which the sale is made, are subject to, and must be in accordance with the act in its general provisions. Thus understood, the several sections of the law are consistent with each other and in harmony with its general purposes, while the other construction renders useless many of its provisions affecting the carrying of all passengers.

Copies of the two forms of mileage tickets sold are given as part of defendant's answer, in which answer it is claimed that the form of ticket which defendant now sells to such commercial travelers constitutes a special contract between defendant and the holders of such tickets, by which defendant, in the transportation of such commercial travelers, is relieved from some part of the liability under and subject to which it transports all other passengers on its line of road; which limitation of liability, defendant submits and claims, constitutes a good and sufficient reason for the discrimination it makes in favor of commercial travelers.

It might be questioned to what extent such an agreement is binding on the parties, and relieves the company from common law liabilities. Any traveler with any baggage might make such an agreement. Putting aside any question of the validity of such a contract, no reason is assigned, nor is any believed to exist, why only commercial travelers should be permitted to enter into such an agreement. The copies of mileage tickets show that none others were permitted to enter into it. The alleged release of liability so made, does not constitute a good and sufficient consideration for the discrimination made in favor of commercial travelers, but is another evidence of discrimination against the general public.

It is further claimed that commercial travelers, as salesmen, represent wholesale merchants and manufacturers, for whom they sell goods, thereby creating a large freight traffic for the roads over which they ride. And further they constitute a distinct class of the traveling public, generally riding short distances at a time, and traveling very much more than other people.

The principle of cheaper rates at wholesale, practiced by merchants who in their sales but consult their own interest, is subject to much modification when applied to railroads, who owe a duty to the public which requires them to treat their customers alike. Besides, it is not quite apparent how one person can travel "very much more" than another on a thousand mile ticket. Riding short distances between, and stopping off at stations is an accommodation which makes the ticket more, not less valuable.

To increase the quantity of railroad business in the manner alleged, traveling salesmen must stimulate consumption and add to the demand for necessities and comforts of life. Commercial travelers are usually men of such energy and superior intelligence that they introduce into some communities articles useful and desirable earlier than such articles might otherwise reach them. Yet the general intelligence of the people is equal to providing themselves with such luxuries and comforts as their means will justify. And the representatives of merchants are not likely to sell, nor railroads to carry, more goods than customers can pay for.

Common carriers may continue the issuance of mileage passenger tickets, the charges for which must be reasonable and just and free from unjust discrimination or unreasonable preference.

Persons belonging to the class known as commercial travelers are not privileged to ride over railroads at lower rates than are paid by other persons. Whatever reasonable rates commercial travelers are made to pay, other travelers may be made to pay. To charge one more than the other is unjust discrimination. And this is true whether tickets issued are mileage tickets or in some other form.

The refusal of the defendant, the Chicago and Grand Trunk Railway Company, to sell the complainant, Larrison, a thousand-mile ticket for \$20, the price at which said company was selling such tickets to commercial travelers, and the neglect to publish rates at which defendant was offering to sell mileage tickets, were alike in conflict with the "Act to Regulate Commerce."

In this opinion all concur.

RALPH W. THATCHER *v.* THE DELAWARE AND HUDSON CANAL COMPANY AND OTHERS.

Heard July 21—Decided July 25.

The fact that railroad companies accept on through shipments from Chicago to Boston a certain sum as their share for the transportation of the freight from Schenectady to Boston, is no ground for compelling them

to accept a like sum on local shipments from Schenectady to Boston, when it appears that this would be a reduction below the rates made from intermediate stations to Boston, on the same line, and apparently under similar circumstances and conditions.

Any order compelling such acceptance would bring the rates charged into conflict with the fourth section of the Act to Regulate Commerce, unless the roads should reduce the rates from the intermediate stations to the level of the rates made from Schenectady. But in the absence of either allegation or proof that the rates from such intermediate stations are excessive, the Commission could not require a reduction.

G. L. Stedman, for complainant.

T. F. Hamilton and *G. A. Torney*, for defendants.

REPORT AND OPINION OF THE COMMISSION.

SCHOONMAKER, *Commissioner* :

The complaint in this case charges, in substance; that the various railroad companies named as defendants, unjustly discriminate against the complainant by refusing to carry grain and flour for the complainant from Schenectady, New York, to Boston and other New England points, at the proportion of all rail rates from Chicago to Boston and the other points reached by through shipments, allowed from Schenectady by the joint tariffs for such through shipments, and demands that all the railroads which participate in the traffic of through lines, which pass Schenectady eastward over the tracks of the Delaware and Hudson Canal Company, shall be required to receive and forward from the Schenectady Elevator, possessed and used by complainant, all grain and other merchandise received at said elevator, either by Canal or railroad, and shipped to said elevator for the purpose of being forwarded further east over the routes of the defendants, and to furnish cars and all needed facilities for transportation of grain, feed, and flour from the Schenectady Elevator and Steam Mills to eastern points, and that they accept as compensation therefor the same amounts of money they severally accept and receive for similar service as parts of the through lines from Chicago.

The answers, in substance, deny the charge of discrimination, and aver that the shipments east from the Schenectady Elevator of the complainant are local shipments, and that the

defendants have the right and that it is their duty under the statute, in order to avoid a violation of the long and short haul provision of the fourth section, to charge local rates or rates not less than from Mechanicsville, Greenfield, and other local and more eastern points to Boston.

The Commission finds the facts material to the disposition of the case to be as follows :

The complainant is the proprietor of a valuable elevator and flour mills, at Schenectady, conveniently located adjacent to the Erie Canal, and to the tracks of the Rensselaer and Saratoga Railroad, leased to and operated by the Delaware and Hudson Canal Company, and has for several years under contract with the Rensselaer and Saratoga Company continued with the Delaware and Hudson Company, had a privilege which has been practically the privilege of shipping grain, feed, and flour from his elevator over the said railroad to and over its connecting roads leading to Boston and other eastern points.

The complainant receives the bulk of his grain from the west transported by water over the lakes and Erie Canal and consigned to him at Schenectady, where it is taken into his elevator and retained until he finds a market for it in New England. He also purchases grain locally at and near Schenectady, which is taken indiscriminately like all the other grain received into the same elevator, and for the same purposes. The elevator is also open to the public, and is used to some extent by other persons than complainant, for the transshipment and storage of grain.

Prior to the time the Act to Regulate Commerce took effect the defendant roads all carried complainant's grain, feed, and flour at the proportion of through rates from Chicago to Boston allowed to the lines from Schenectady to Boston. The percentage of those through rates was twenty per cent. of the Chicago rate of thirty cents per hundred pounds, or practically six cents per hundred. The subdivision of the Fitchburgh roads from Mechanicsville to Boston of this proportion was five cents and seven hundred and seventy-eight one thousandths. Since the Act to Regulate Commerce took effect the several roads have refused to ac-

cept this proportion from complainant, giving as the reason therefor that it would violate the fourth section of that act, since the rates from Albany, Troy, Mechanicsville, and North Adams, which are further east and nearer Boston than Schenectady, on the Fitchburg line, are greater than such proportion would be.

The principal shipments from complainant's elevator have been over the Delaware and Hudson road to Mechanicsville, and thence over the Fitchburg lines to Boston. He makes no shipments by way of Albany over the New York Central and Boston and Albany roads. The Fitchburg road now controls the Troy and Boston line and the Boston, Hoosac Tunnel and Western road. Since the change above stated, the complainant has made no shipments over these lines on account of the rates.

Upon this statement of facts it is seen that what the complainant asks from the Commission is an order that shall require the several defendant roads to receive freights at his elevator at Schenectady for transportation to Boston, and Boston points, at rates less than are now charged by the same roads for the transportation of like freights to Boston and Boston points from stations on the same lines nearer to the points of destination, and the transportation of which freights would, so far as we can now see, be under substantially similar circumstances and conditions. Such an order, if issued, would require the roads to depart from the general rule laid down in the fourth section of the Act to Regulate Commerce. While that act authorizes the Commission to permit exceptions under some circumstances and conditions indicated by the law, it does not empower the Commission to require exceptions.

This is the only question which is so presented by the complaint that the Commission can pass upon it. It may be truthfully said that the several defendants might avoid any conflict with the fourth section of the Act by reducing their charges to Boston and Boston points from the stations east of Schenectady; but this complaint does not ask the Commission to compel such reduction, nor has any evidence been given or offered which would enable us to determine

what would be proper and just rates from any such stations. It is therefore impossible to fix them in this case, even if the Commission had power to make rates generally, which it has not. Its power in respect to rates is to determine whether those which the roads impose are for any reason in conflict with the statute.

The rates with which complainant finds fault it is not claimed are in conflict with the statute, unless the conflict is found in the fact that they exceed what the roads accept on through business as their proportion of the rates fixed at distant points. If that is in any sense contrary to the law, the illegality would not be corrected by compelling the roads to accept upon shipments from Schenectady rates less than are charged from the stations further east. We cannot correct one alleged violation of law by compelling another.

If complainant thinks the rates from Schenectady and intermediate points to Boston and Boston points are excessive he can raise that question directly and distinctly, and the Commission can then enter upon a full investigation of the facts bearing upon it. But the question is not made here.

It is proper to state that the question whether a proportion of through rates less than the local rates over the same line can lawfully be accepted, is involved in a pending case, and is awaiting further evidence and argument.

The complaint must be dismissed.

In this opinion all concur.

THE ASSOCIATED WHOLESALE GROCERS OF ST. LOUIS v. THE MISSOURI PACIFIC RAILWAY COMPANY.

Tried July 22, 1897—Decided July 25, 1897.

Mileage, excursion and commutation passenger tickets are each issued for a different purpose, and the price for each kind is determined on special considerations. The charge made for one kind, therefore, does not determine what it will be admissible to charge for either of the others.

That twenty-five dollars for a thousand mile ticket is too much cannot be inferred from the fact that excursion and commutation tickets are sold at rates which would make transportation upon them for a thousand miles less than twenty-five dollars.

Mileage tickets when issued must be sold impartially to all who apply for them, and on the same terms.

Complainant appears by committee of members.
Dillon, Swayne & Blair, for defendant.

REPORT AND OPINION OF THE COMMISSION.

WALKER, *Commissioner*.

The facts found in this case are as follows :—Prior to April 5th, 1887, the defendant sold mileage tickets over its road to the general public for \$25 per thousand miles, and to commercial travelers for \$20 per thousand miles. Since the Interstate Commerce Law became operative it charges \$25 to all alike. It also now sells excursion tickets and commutation tickets at rates which are less per mile than are charged for mileage tickets, and which in some instances would amount to no more than \$15 per thousand miles. These excursion and commutation tickets are open to all purchasers, on the same terms.

Upon these facts complainants claim that their commercial travelers are unjustly discriminated against; and also that any sum over \$15 for a thousand mile ticket to commercial travelers is unjust and unreasonable.

The issuance of these three classes of tickets, called mileage, excursion, and commutation tickets, is permitted by section 22 of the Act to Regulate Commerce. They are each issued for distinct purposes and the form of the contract in each case is different. In establishing the price upon each, different considerations obviously arise. The Commission does not regard the fact that excursion or commutation tickets are put on sale at a given rate, to be one that entitles the purchaser of a mileage ticket to complain of unjust discrimination if charged a higher rate. The "circumstances and conditions," to use the phraseology of the second section of the Act, are not the same.

Upon the question whether \$25 per thousand miles is more than a just and reasonable rate for the sale of mileage tickets to commercial travelers, the only evidence offered was that above stated, that excursion and commutation tickets are sold at rates which are the equivalent of a less sum per mile than that rate produces, and that the former rate to commercial

travelers was \$20. Upon this evidence alone the Commission cannot find the established price to be unreasonable.

The complainants also desire to have mileage tickets sold to their commercial travelers at a lower price than they are sold to the public generally, and insist that such a discrimination would not be unjust, in view of the peculiar character of their business. They claim that the consideration that commercial travelers are continually upon the road, and their labors result in great benefit to the freight traffic of the carriers, entitles them to the lowest rate of fare offered to or enjoyed by any portion of the traveling public, and that a special rate on mileage tickets should be given them.

In other words, the Commission is asked to order and direct that a discrimination be made in favor of commercial travelers in the sale of mileage tickets, as was done by defendant prior to the passage of the law.

The Commission would hardly be willing to make such an order in any case, however urgent the circumstances might appear to be. But in respect to this matter we are agreed that the entire policy and spirit of the law are against it, and that when mileage tickets, as distinguished from trip tickets, are issued, they should be sold to all impartially and on the same terms—and we have so decided in the cases of Larrison against the Chicago and Grand Trunk Railway Company and of Michigan Central Railroad Company against the same.

The petition is, therefore, dismissed.

In this opinion all concur.

THE BOSTON AND ALBANY RAILROAD COMPANY
v. THE BOSTON AND LOWELL RAILROAD COM-
PANY *et al.*

TWO CASES.

THE VERMONT STATE GRANGE v. THE BOSTON
AND LOWELL RAILROAD COMPANY *et al.*

Heard at Rutland, Vt., Sept., 1, 2, 3, 1887—Decided at Chicago, Sept. 20, 1887.

When complaint is made that one of several companies forming a line for long haul traffic charge more for short hauls on its own line than is

charged for long hauls on the line made by all the companies, it is proper to make them all parties defendant, since the low charges on the long haul traffic of all might perhaps be affected by changes made in the higher charges for short haul traffic of one, and, therefore, all may have an interest in being heard.

It is not a grievance of which a railroad company can complain on its own account that its competitor in long haul traffic violates the "long and short haul clause" of the fourth section of the Act to Regulate Commerce, when such company is in no way interested in the high charges made on short haul traffic, and does not aver that there is any connection between such high charges and the low charges made on the competitive traffic.

It is not a valid reason for one railroad company instituting proceedings against another for violating the "long and short haul clause" of the fourth section of the Act to Regulate Commerce, that the complaining party desires to know whether the other is justified in making the high charges on short haul traffic, in order that it may do the same if such charges are sustained. The case of every road must be determined on its own facts, and a judgment sustaining the charges of one would not determine the rightfulness of similar charges by another.

One may complain on public grounds of a violation of the Act to Regulate Commerce which amounts to a public grievance, without having any personal interest whatever to be affected by the violation, except as one of the public.

A voluntary State association of persons engaged in an industrial pursuit, and therefore presumably interested in railroad rates in the State, may be complainant in proceedings charging a violation of the "long and short haul clause" of the Act to Regulate Commerce by roads within the State, and praying that such roads be required to cease and desist from such violation.

The "same line" intended by the "long and short haul clause" of the act in a physical line and not a mere business arrangement. And one piece of road may be part of several lines, as the road from Boston to White River Junction is part of the line from Boston to St. Albans, and also part of the lines severally to Montreal, Ogdensburgh, Detroit, Port Huron and Chicago.

If several roads join in making the tariff which constitutes the lesser charge on the longer haul, while one or more of their number make the greater charge on the shorter haul, the case is within the statute, and those who make such greater charge must justify it.

Railroad companies over whose roads a fast freight line operates, and which divide its expenses and receipts, are responsible for its action in making and filing rates, and must at their peril see that its charges upon traffic over their roads are in conformity to law.

Where the real competition for long haul traffic is by railroad, the fact that there is also possible water competition will not of itself make out the dissimilar circumstances and conditions which will support greater charges on shorter than on longer hauls under the fourth section of the

act. The real, not the possible, competition will be considered when such greater charges are in question.

The fact that one railroad line competing for long haul traffic is long and circuitous, and in order to share in the traffic is obliged, as against competitors having more direct lines and able to make more speedy transportation of freights, to make concessions in its charges, will not make out the dissimilar circumstances and conditions intended by the fourth section of the Act to Regulate Commerce, and which alone can justify the greater charge for the shorter than for the longer haul, which is permitted to be made in some cases by that section.

Samuel Hoar, for the complainant in the first two cases.

George F. Edmunds and *Haskins & Stoddard*, for the complainant in the third case.

B. F. Fifield, for the Central Vermont Railroad Company.

A. A. Strout, for other defendants.

REPORT AND OPINION OF THE COMMISSION.

COOLEY, Chairman.

On May 24, 1887, the Boston and Albany Railroad Company presented its petition stating "that the Boston and Lowell Railroad Company, a Massachusetts corporation; the Concord Railroad Company, a New Hampshire corporation; the Northern Railroad Company, a New Hampshire corporation; the Central Vermont Railroad Company, a Vermont corporation, and the Grand Trunk Railway Company, established by the laws of Canada, have issued schedules of joint rates under the name of the National Despatch Line, and under these schedules the rates from Boston to Detroit, Michigan, are: 51-45-35-24-20-18 for the six classes of freight, respectively; and to Montreal, Canada, 45-40-30-23-20-18 for the six classes of freight, respectively; while at the same time the Boston and Lowell, Concord, Northern, and Central Vermont Railroad Companies, a part of the roads included in the National Despatch Line, have made and maintained rates from Boston to St. Albans, Vermont, a station on the Central Vermont Railroad, a less distance from Boston than either Detroit or Montreal, in the same direction over the

same line as follows : 60-50-40-27-24-17 for the six classes of freight, respectively.

“ The National Despatch Line comes into competition with the Boston and Albany Railroad Company and its connections at Detroit and other western points.

“ The grievance which this company and its connections have is that the National Despatch Line makes rates to Detroit and other points in the West less than the Boston and Albany Railroad Company and its connections make to the same points ; while at the same time a certain combination of roads, including a part of the roads in the National Despatch Line, viz., the Boston and Lowell, Concord, Northern, and Central Vermont Railroad Companies, maintain higher rates to St. Albans and other immediate points—that is, higher rates for the short haul than for the long haul on the same line in the same direction on the five upper classes of freight, whereas, if the rates to Detroit and other Western points were made the same—no higher and no lower—than to any intermediate point on the same line in the same direction, your petitioner would have no reason to complain.”

“ On the same day the complainant presented another petition representing that the Boston and Lowell Railroad Company, a Massachusetts corporation ; the Concord Railroad Company, a New Hampshire corporation ; the Northern Railroad Company, a New Hampshire corporation ; the Central Vermont Railroad Company, a Vermont corporation ; and the Ogdensburgh and Lake Champlain Railroad Company, a New York corporation, have made an arrangement by which the Steamship Company operated by the Ogdensburgh and Lake Champlain Railroad Company has issued a tariff from Boston to lake ports in the United States at a less rate than is charged at the same time from Boston to Ogdensburgh and other points on the same line at a shorter distance from Boston in the same direction. The rates are as follows :

From Boston to—

Cleveland, O.,	}	41-36-29-20-17-14 for the six classes of freight, respectively.
Detroit, Mich.,		
Port Huron,		

To—

Milwaukee, } 44-39-31-23-19-16 for the six classes, respec-
Chicago, } tively, and from Boston to—
Ogdensburgh, 60-50-45-30-25-17 for the six classes of freight,
respectively.

“This line via Ogdensburgh comes into competition with the Boston and Albany Railroad Company, and its connections at Cleveland, Detroit, Port Huron, Milwaukee, Chicago and other Western points.

“The grievance which the Boston and Albany Railroad Company and its connections have is that the line via Ogdensburgh makes rates to the above places less than the Boston and Albany Railroad Company and its connections make to the same points, while at the same time the above named roads, viz., the Boston and Lowell, Concord, Northern, Central Vermont, and Ogdensburgh and Lake Champlain Railroad Companies maintain higher rates to Ogdensburgh and other immediate points—that is, higher rates for the short haul than for the long haul on the same line at the same time in the same direction, whereas if the rates to Cleveland, Detroit, Port Huron, Milwaukee, and Chicago were made the same, no higher and no lower than to intermediate points on the same line in the same direction, your petitioner would have no reason to complain.”

To these petitions the several defendants made answer, but it is deemed unnecessary to do more in this opinion than to give one in each case.

The answer of the Boston and Lowell Railroad Company to the petition first above recited, denies that the defendants “have issued joint rates under the name of the National Despatch Company as therein averred, and further denies that the line of railroads, or the railroad which established and maintains any joint rates, or any rates for the carriage of freight between Boston and St. Albans and intermediate points, is the same line or railroad corporation as the line which establishes and maintains the rates of freight between Boston and Detroit and other western points, as alleged in said petition; and further denies that the same carrier or line of railroads or this defendant charge higher rates for a short

haul than for a long haul over the same line in the same direction for the like kind of property in the manner set out in said petition ; and further alleges that the transportation of freight between the points named in said petition has not been and is not under substantially similar circumstances and conditions within the true intent and meaning of the act of Congress.

“And this defendant further says that the Boston and Lowell railroad, the Nashua and Lowell, the Concord, the Northern and the Central Vermont railroads are connecting railroads so far as trackage is concerned, from Boston, Mass., to St. Albans, Vt. These roads are not managed or controlled by each other, except that the Nashua and Lowell and the Northern are in fact operated by the Boston and Lowell ; nor is there between them an arrangement for a continuous carriage or shipment of property over the same, although it is true that they sometimes make joint tariffs of rates between Boston and St. Albans, aforesaid, and interchange cars. At the time of filing the petitioners’ complaint the rate fixed by said joint tariff from Boston to St. Albans was and is as stated in said petition.

“These defendants further say that the National Despatch Line, referred to in the said petition, is a line of cars running from Boston, Mass., to all large points in Canada and in the Western States, west of St. Johns in Canada, via the Grand Trunk Line. They consist of 3,750 freight cars, marked ‘National Despatch Line,’ and they are owned as follows :

“The National Car Company, a corporation chartered and organized under the laws of Vermont, owns 3,000 of said cars. The Grand Trunk Railway Company of Canada owns 700, and the Chicago, Pekin, and Southwestern Railroad owns 50. The roads over which the National Despatch Line sends freight, and which use these cars, are as follows :

“Boston and Lowell [and others are enumerated, including some whose lines extend beyond the Mississippi.]

“The National Despatch Line have their principal office in Boston, Mass. They solicit freight at Boston and other places in New England for transportation to all prominent

points in Canada and the Western States west of St. Johns. They have agencies in Boston and other eastern points and in Chicago and other western points. They do not receive or solicit freight at Boston or other New England points, the destination of which is south of St. Johns, for west bound freight. They issue their own bills of lading, and they also issue and publish their tariff for transportation from New England points to points in the Western States and Canada west of St. Johns. They do not issue bills of lading for west bound freight from New England points to points south of St. Johns, nor do they make a tariff nor profess to be carriers between those points in respect to west-bound freight destined south of St. Johns. St. Albans, Vt., is south of St. Johns, and is not embraced in the tariff made by the National Despatch Line for west-bound freight. The rates made to points west of St. Johns, where there is competition with complainant's line, are made under this tariff by the National Despatch Line.

"And this defendant denies that the joint tariff aforesaid constitutes an arrangement for a continuous carriage within the meaning of the first section of the Interstate Commerce Law ; but if it does, then it alleges that the joint tariff from Boston to St. Albans makes a wholly different line from the one made by the joint tariff of the National Despatch Line, within the meaning of the fourth section of said law.

"And this defendant further says that the rates from Boston and intermediate points to St. Albans are reasonable ; that nobody along the line is dissatisfied with the rates made ; that the Boston and Albany line is not a competitor for traffic for west-bound freight from Boston or intermediate points to St. Albans, and is in no way interested in the rates that are made thereto. It further says that the Central Vermont road runs through a sparsely settled country ; that the local traffic thereon is small, and that it was constructed at a great expense through an uneven country with high grades ; that the road has been foreclosed and reorganized, and the original capital put into the construction of the same has been lost ; that if said road was compelled to depend on local traffic, it could not pay its expenses and interest on its bond-

ed debt, to say nothing of the stocks of the road as it has been reorganized. And this defendant further says that the additional expense of doing through traffic as compared with local traffic is small in degree; that its road is the same whether the traffic is local and small or large by reason of through business; that the profit which it makes out of the through business is quite as important to it as the profit on the local business, by reason of the volume of the through traffic as compared with the local traffic; that the volume of business from Boston to St. Albans is not one-twentieth part of what it is to points beyond there, westward; that it has been to very large expense for terminal facilities, among other things, to accommodate such through traffic, and this expense amounts to more than \$3,000,000.

“And these defendants further say that the Central Vermont road extends northerly from St. Albans to the State line, a distance of about ten miles; that it there connects with the Montreal and Vermont Junction railroad, a Canada corporation, which extends about twenty-two miles northerly to St. Johns, in Canada, where it connects with the Grand Trunk railroad, which extends through Canada to Windsor, opposite Detroit.

“It is over this line that the National Despatch cars principally run. And this defendant further says that the rate made by the National Despatch line from Boston to Montreal is, and was at the time of the filing of the petitioner's complaint, the same as stated in said complaint, and for the following reasons: There are many competitors at Boston for traffic to Montreal; there are none for traffic to St. Albans. Boston traffic is taken by ocean steamers to Halifax, Nova Scotia, and St. Johns, New Brunswick, and thence by Canadian railways to Montreal. It is also taken via Passumpsic and Southeastern railway to Montreal, the latter railroad being a foreign corporation. Traffic is also taken from New York to Montreal by the Delaware and Hudson River Canal Company, which extends from New York city to Rouse's Point, within fifty miles of Montreal, and is a railroad entirely within the State of New York. Halifax and St. Johns, N. B., are foreign cities, and together with New York are com-

petitors with Boston for the sale of goods to the merchants of Montreal. Unless the rate of freight is as low from Boston to Montreal as from the aforesaid cities to Montreal, the traffic will not go over the roads used, as the National Despatch line. The Grand Trunk via Portland, is the strongest competitor for traffic from Boston to Montreal, and is a foreign corporation. The National Despatch line make the rates they do from Boston to Montreal from necessity and by reason of competition, and for no other reason.

. "And this defendant further says that the rate made by the National Despatch Line from Boston to Detroit is and was as stated in said petition, at the time of filing thereof. There are many competing lines for Boston traffic to the West, and especially to Detroit. The Baltimore and Ohio takes traffic at Boston by ocean steamers to Philadelphia and Baltimore, and thence over their line to all large points in the West. The Boston and Albany Line via the New York Central and Michigan Central Railroads and steamships from Buffalo takes freight westward to all lake points, and more especially Detroit. The Grand Trunk Line via Portland is still another line in competition for west-bound traffic to Detroit and all other large points in the West. The Grand Trunk Railway Company is a foreign corporation, and their line runs principally through Canada to Windsor, Ontario, opposite Detroit, and Point Edward, Ontario, opposite Port Huron, Michigan. The defendant's line from Boston to St. Albans, in connection with the Ogdensburgh and Lake Champlain Railroad and the line of boats on the Great Lakes, called the Central Vermont Line of Steamers, constitute still another line which comes in competition with the National Despatch Line at Detroit and other western points. The Canadian Pacific, another foreign corporation, is in competition for this same traffic. Many others might be named, and especially the New York and New England and its connections, also the Fitchburg and Hoosac Tunnel Line.

"And this defendant further says that these competing lines largely dictate the rates from Boston to Detroit and other competing points in the West; that the defendant's lines must make as low rates to these points of competition as the

other lines, or go out of the business ; that the through business to competing points is important to this defendant and the other connecting roads, and is a source of large profits to this defendant. And this defendant further says that the circumstances and conditions under which freight traffic is taken and transported from Boston to St. Albans is wholly dissimilar to what it is in respect to freight traffic which they take and transport west of there to points of competition, and more especially Montreal and Detroit ; that the rates made from Boston to Montreal and Detroit, respectively, are made from necessity and for no other reason ; that the petitioner is in no wise interested in the rates from Boston to St. Albans ; that its motive in filing its petition is to break down one of its principal competitors for through business from Boston to Detroit and other points in the West, and from no other motive. And this defendant further says that it has acted in good faith in the premises ; that it has given the best construction it could to the Interstate Commerce Law, and under the advise of counsel, and if it has erred it will ask leave to file its petition to be relieved from the operation of the fourth section of said act."

The joint and several answer of the Central Vermont Railroad Company and the Ogdensburgh and Lake Champlain Railroad Company to the petition secondly above set forth says that "the Boston and Lowell, the Nashua and Lowell, the Concord, the Northern, the Central Vermont, and the Ogdensburgh and Lake Champlain Railroads, form a connecting line of railroads, so far as trackage is concerned, from Boston to Ogdensburgh, N. Y. These roads are not managed or controlled by each other, except the Nashua and Lowell and the Northern are under lease to the Boston and Lowell, and the Ogdensburgh and Lake Champlain is under lease to the Central Vermont Railroad, nor is there between them an arrangement for a continuous carriage or shipment, unless it may be implied from the making of joint tariffs and the interchange of cars. At the time complained of in the petition there was, and still is, a joint tariff for west-bound traffic from Boston to Ogdensburgh over the aforesaid roads, at the rates stated in the petition.

“From Ogdensburgh there is a line of eight steamers which run between there and Chicago and touch at various points on the Great Lakes, and more especially at Cleveland, Detroit, Port Huron, Milwaukee, and Chicago. This line of steamers is controlled by the Central Vermont Railroad Company, and they have a joint tariff with the roads aforesaid, entirely different and independent from the one between the roads themselves, as before stated, from Boston to Ogdensburgh.

“This line is called the Central Vermont Line of steamers. They take no traffic for points between Boston and Ogdensburgh, but only for points west of Ogdensburgh for westward bound freight. They make the rates from Boston to lake points as stated in the petition.

“The defendants insist that the aforesaid joint tariffs do not constitute an arrangement for a continuous carriage or shipment within the meaning of the first section of the Interstate Commerce Law; but if they do, then they do not constitute the same lines within the meaning of the fourth section of said law.

“And these defendants further say that the rates from Boston to Ogdensburgh referred to in said petition are entirely reasonable; that shippers do not complain, nor do the public at Ogdensburgh. There is no competition with the defendant's line at Ogdensburgh for traffic from Boston to Ogdensburgh. The Ogdensburgh and Lake Champlain and Central Vermont roads embrace more than half the distance from Ogdensburgh to Boston. They run through a sparsely settled country with high grades, and are operated at unusually large expense, especially in the winter by reason of heavy drifts of snow and excessive frosts.

“They have both been foreclosed and reorganized, and the original capital put into the construction has been lost; and if they were compelled to depend upon local traffic alone, they could not pay their expenses and interest on their bonded debt, to say nothing of the various stocks of the roads as now reorganized. These roads have been brought up to a high state of efficiency for the purpose of doing a through business from the seaboard to the West, and if the

rates from Boston to points on the Great Lakes made by the Central Vermont line of steamers aforesaid were raised to the same rates as the tariff from Boston to Ogdensburgh, no traffic would go by this line to points on the Great Lakes by reason of competition with other lines, and more especially the Boston and Albany Line hereinafter referred to.

“On the other hand, if the rates from Boston to Ogdensburgh were reduced to the same rates as from Boston to points on the Great Lakes, it would seriously cripple these defendants’ roads and would weaken them as competitors for through business by the Boston and Albany Line without affording any relief to Ogdensburgh, but it would probably result in a large increase in the rates from Boston to Ogdensburgh in order to maintain the roads, if the through business is given up.

“And these defendants further say that there are many competing lines for Boston traffic to the West—[Enumerating them:] that these various lines compete with the defendant’s line at the various lake points referred to in the petitioner’s complaint and dictate the rates that shall be charged thereto; that the defendant’s line must make as low rates to these points of competition as the other lines, or go out of the business; that this through business to competing points is quite as important to these defendants as their local traffic; that the amount of traffic from Boston to Ogdensburgh and intermediate points is not one-twentieth part of what it is to points west of Ogdensburgh; that they make money on their through business, and without it they could not secure any adequate return for the capital invested in defendants’ roads.

“And these defendants further say that the circumstances and conditions under which they take traffic from Boston to Ogdensburgh is wholly dissimilar from what it is in respect to traffic which they take west of there to points of competition on the Great Lakes; that the cost of service is relatively small for the water carriage west of Ogdensburgh as compared with the railroad carriage between Boston and Ogdensburgh, but the rates made from Boston to lake points on this line are made from necessity and for no other reason; that the

petitioners are in no wise interested in the rates from Boston to Ogdensburgh; that their motive in filing their petition is to break down one of their principal competitors for through business from Boston to lake points aforesaid.

“And these defendants further say that they have acted in good faith in the premises; that they have given as good construction as they could to the Interstate Commerce Law, and under the advice of counsel, and if they have erred they will ask leave to file their petition to be relieved from the operation of the fourth section of said Act.”

While the cases were pending the Vermont State Grange of the Patrons of Husbandry, representing itself as “an association of farmers and business men, organized and located within the State of Vermont,” presented what is called in the proceedings an intervening petition, but which for all practical purposes is an original complaint, which, after reciting the pendency of the proceedings, goes on to allege “that the tariff rates and charges made by the defendants for the transportation of property from Boston, in the State of Massachusetts, and points near said Boston, to St. Albans, Burlington, Middlebury, and other places in the said State of Vermont, and from said places in Vermont to Boston and places near thereto are higher than the charges made by said defendants and said National Dispatch Line from said Boston to Montreal, in the province of Quebec, Detroit, in the State of Michigan, and other points beyond and northerly and westerly of the said State of Vermont, and from said northern and western points to said Boston” in contravention of the statute, and also “that said charges for transportation of property from Boston aforesaid to said points in Vermont, and from said Vermont points to Boston and other places in the vicinity thereof, so made by the defendants are exorbitant in fact, and are not reasonable or just.”

The same defenses were relied upon to this as to the other petitions, and the cases were all heard together at Rutland, Vermont, on the first day of September and following days.

Before proceeding with the evidence the Grand Trunk

Railway Company moved that the complaints as to it be dismissed, for the reason that the charges supposed to be in violation of the statute were not made or shared in by it; its participation, if any, being only in the low charges on the long hauls, which in themselves were perfectly legal and were not averred to be otherwise. The Commission, however, was of opinion, and so held, that the interest of that company was such, and the liability of the low rates on long-haul traffic to be affected by changes made in the higher rates on short-haul traffic was so great that in case it had not been made a party, and should now come in and ask to be made such in order that it might present evidence and be heard by counsel, it would be proper to order accordingly. This being the case, it was equally proper for complainants to join it as a party respondent in the first instance.

The right of the petitioner in the first complaints to bring the matters involved before the Commission for its action is challenged by the defendants, who inquire what legitimate interest the Boston and Albany Railroad Company can have in the rates made by the defendant companies and which are supposed to be in violation of law. Those rates are local rates; the Boston and Albany does not pay or participate in paying them; they are not even competitive rates to those which are imposed on its road, and if they were, the fact that they are excessive would tend to its advantage. The petitions do not show that those who pay them regard them as excessive or unjust, nor is it averred that they are so in fact. It is consistent with everything that appears in the first two complaints that these rates are fair and just; that they are even necessary as defendants aver they are; and that the parties who pay them do so without complaint and willingly. Why then should this petitioner complain?

The petitions answer this inquiry by saying that "the grievance which this company and its connections have is that the National Dispatch Line makes rates to Detroit and other points in the West less than the Boston and Albany Railroad Company and its connections make to the same point," while at the same time making higher rates to intervening points. But what the higher rates to the intervening

points have to do with the complainant's "grievance" the petition fails to inform us. No connection between the high rates and the low is shown or averred. It is not said that the one set are made high in order that the other may be made low, or that the long-haul traffic is taken at the expense of the short-haul traffic. As the case stands upon the first two complaints the sole grievance of the petitioner is that the defendant roads accept traffic from Boston to Western points at lower rates than are made by petitioner and its connections; and the legitimate inference must be that the purpose of the proceedings is to compel the putting up of those rates. But in that purpose the petitioner can certainly expect no aid from this Commission. The defendant companies have the legal right to make the low through rates, and their competitors cannot restrain them.

On the argument it was said on behalf of the Boston and Albany company that the purpose of the proceeding was to obtain a construction of the Act. The petitioner desires to know whether the Central Vermont Railroad Company is justified in making with its connections higher rates from Boston to St. Albans and intervening points than it makes to Montreal and more distant points. It desires to have an authoritative decision on that subject, in order that, if such higher rates are sustained, it may proceed in like manner to impose in respect to its traffic higher rates upon shorter than upon longer hauls. And as it was well understood that this Commission did not give opinions upon abstract questions, or undertake to construe the law as a guide to parties in their own business when no controversy was pending before it, these proceedings were begun in order to present the necessary contention.

One obvious remark upon this is, that it is not warranted by the complaint, which undertakes to advance and rely upon a "grievance." Another, equally obvious, is that the desire to have safe guidance in one's own business is not a legitimate ground for overhauling the business of another with which the party has no other concern. Moreover a decision upholding the lawfulness of the greater charges made for the shorter hauls by the Central Vermont and its connections,

could not, in the nature of things, constitute a rule for the petitioner in deciding whether to impose greater charges for shorter hauls on its line. Our reasons for this were fully given *In the Matter of the Louisville and Nashville Railroad Co.* We there pointed out that the right to make such charges under the law was exceptional; that it depended in every case upon the peculiar circumstances and conditions; and while we did not undertake to indicate all the reasons that might justly or plausibly be advanced in support of an exception, enough was stated to make clear as we thought how impossible it is to lay down definite rules by which the cases as they arise may be readily determined. It is upon its own circumstances and conditions that each case must be judged.

In the cases before us there is neither allegation nor proof that the circumstances and conditions of the local traffic on the Boston and Albany and its connections are like or substantially like the circumstances and conditions of the local traffic of the Central Vermont and its connections between Boston and St. Albans. If therefore it were to be decided that the greater charges on the shorter hauls which are here complained of are just, reasonable and legal, it would not follow that the Boston and Albany and its connections could make the like charges. The reason is plain: The decision would be confined to the facts of the very case in judgment; and how it would apply to the facts of any other case not exactly like it, would be matter of inference and argument only. The greater the difference in circumstances and condition the less would be the likelihood that the decision could be accepted as a precedent. And perhaps it may be safely said that any well-informed person who has even a general knowledge of that section of the country knows that the circumstances and conditions of local traffic on the Central Vermont must be greatly different to what those are of the local traffic on the Boston and Albany. The latter runs through the more densely populated country; it has more considerable towns and large manufactories upon it, and for these reasons has a vastly greater volume of business within its reach. It also takes the better direction for a heavy long-haul traffic.

In what has been said we are not to be understood as hold-

ing that a complainant must necessarily have a pecuniary interest in order to entitle him to be heard. There are no doubt many cases in which an individual having no interest except to see that the law is enforced for the benefit of society may complain in his own name but in the public interest. In these cases the petitioner does not complain in the public interest, but in its own, and the grievance of low long-haul rates, of which it complains, is not a public grievance.

The Act to Regulate Commerce, however, expressly provides that "No complaint shall at any time be dismissed because of the absence of direct damage to the complainant." Under this provision when an alleged infraction of the law of such a character as to constitute a public grievance of considerable general importance is brought to the attention of the Commission, by a responsible party in a duly authenticated form, it may be the duty of the Commission to enter upon its investigation, and if the charge is substantiated, to apply appropriate relief. We are relieved from any necessity of determining what would be the proper course to pursue in such a case by the fact that the question of the violation of law is directly presented in the petition filed by the Vermont State Grange of the Patrons of Husbandry. We are not informed whether that body is incorporated, nor is it important. It was conceded on the argument to be an association formed for proper purposes by respectable people of the State, and presumably those persons are interested, or are liable to be, in the charges complained of. They find their grievance not in the low rates which the law does not undertake to restrict, but in the high rates which, if not justified by a proper showing, stand condemned, and as these are likely to bear with peculiar weight upon those who follow the calling of husbandmen, it is very proper that they as an association, if they believe the rates wrong and oppressive, should raise the question. Upon the petition of the State Grange, therefore, we proceed to examination of the merits of the controversy.

I. It is contended on the part of the defendants that they do not nor does either of them violate the fourth section of the Act to Regulate Commerce, because the shorter hauls for

which the greater charges are made are not over the same lines as the longer hauls for which the charges are less.

This contention is based on the phraseology of the first and fourth sections of the act. By the fourth section it is made unlawful for "any common carrier subject to the provisions of this act" to charge more, &c., "for a shorter than for a longer distance over the same line in the same direction, the shorter being included within the longer distance." The first section prescribes who shall be subject to the provisions of the act. They are "any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment," &c. The party then, it is claimed, who can be liable under the fourth section must, it is said, either be a single carrier operating by itself a line upon which the charges are made, or it must be carriers operating a line "under a common control, management, or arrangement for a continuous carriage," &c. The defendant corporations have each their separate board of directors; they are not under a common control or management; they have no common arrangement for a continuous carriage. Their tracks connect and a carriage may be made continuous by the delivery of property from one to another till it reaches its destination, but the delivery is a common law duty irrespective of common arrangement. The making of a joint tariff is not, it is argued, such a common arrangement as the act contemplates: it is only an agreement as to what each will accept as its share of the charge for a haul over the roads or lines of them all. The long and short hauls, then, are not on the same line unless both are on the line of the same carrier, which is not the case here. But if two or more roads could be regarded as one "line" within the meaning of the act, the charges complained of here are not for hauls on the same line; the line from Boston to St. Albans which some of the defendants form being a different line from that formed to Montreal through St. Albans, and different again to that formed to Detroit, and so on. This is the substance of the very ingenious argument presented and elaborated for the defence.

We do not think the argument sound. Without pausing now to inquire what was meant by the words "under a common control, management, or arrangement," &c., or whether those words have any application at all to carriers wholly by railroad, we have no difficulty in holding that if the defendants join in making the tariff which constitutes the lesser charge on the longer haul, while one or more of their number make the greater charge on the shorter haul, the case is within the fourth section, and those who make such greater charge are called upon to justify it. "Any common carrier" is as much restrained when it unites with one or more others in making the long haul charge as when it makes such charge independently. Nor have we any doubt as to the meaning of the word "line" in the act. A physical line was meant; not a business arrangement, and one piece of road may be part of several lines, as the road from Boston to White River Junction is part of the line to St. Albans, and also part of the lines severally to Montreal, Ogdensburgh, Detroit, Port Huron, and Chicago. When a greater charge is made from Boston to White River Junction than is made by way of that point to any one of the other points named the two are made for hauls on the same line, the shorter being included within the longer distance.

II. By some of the defendants it is claimed that the case is not brought within the fourth section of the act, because the tariff for the long haul traffic is not made by the defendants, singly or collectively, but by the National Despatch Line which operates over their roads.

The National Despatch Line is one of the many fast freight lines of the country, but is perhaps in some respects peculiar. It is neither a corporation nor an association of persons. It exists by virtue of no formal agreement or writing. One witness speaks of it as a name merely; another as a trade mark. It is nevertheless, so far as the public dealing with it are concerned, an actuality of much importance, for it not only transacts a large business but takes all the traffic passing over the Central Vermont destined to or coming from points beyond St. Albans. It has for general manager Mr. John Porteous, who owes his office or position to the president of the Central

Vermont Railroad Company, whose power to appoint does not appear. Mr. Porteous appoints some assistants, but in general the railroad agents are agents of the National Despatch Line also. The reason for establishing the line originally was that the roads were greatly deficient in rolling stock, and a car company was formed to loan them cars, and this line called into existence to operate the cars. The roads pay mileage for the use of the cars. The earnings of the line less the expenses are divided among the roads in agreed proportions. Mr. Porteous makes the tariffs for traffic taken by the line. The long haul traffic rates mentioned in the complaints are rates made by him, the several defendants taking no part in making them.

These are the facts as they appear from the proofs. We deem it unnecessary to comment upon them any further than is needful to draw the legal conclusion. The responsibility of the defendant carriers for the long haul rates is unquestionable. They did not through their own officers fix them, but they one and all acquiesced in the designation of a person to be allowed to fix them, they permit the business to be done over their roads respectively at the rates named, and they accept their several proportions. It would be difficult to imagine a method whereby they would become bound more conclusively, for Mr. Porteous is agent for all in making the rates, and they all acquiesce in what he does, so that they would be bound even if he had acted at first without full authority. The arrangement as it exists in fact, though it be only a name or a trade mark, makes the National Despatch Line or its manager representing it, the agent for such roads as the line is operated over. Its rates are their rates for the business done, and at their peril they must see that its tariffs are filed with this Commission, and that in other particulars the law is obeyed by it.

III. The principal controversy in the case has been over the justification set up for the charges on the short haul traffic. As bearing upon that controversy a considerable body of evidence was taken, the purpose of which was to show that the very low rates charged for long haul traffic were a necessity of the situation, and that the higher rates

for short haul traffic were the lowest that could be afforded. As the Central Vermont is the road principally concerned with the short haul rates, and the lines for long haul traffic are very often spoken of as Central Vermont lines, it will not be necessary in the further discussion of the case to distinguish between the several roads, and what we have to say will perhaps be more readily grasped and understood if we avoid doing so.

The Central Vermont is the successor to the Vermont Central and the Vermont and Canada roads, constructed in 1849 for local traffic and which became bankrupt and sunk all their capital. There was a long receivership, at the end of which a reorganization was affected under the name of the Central Vermont with a bonded debt of seven million dollars. The company as reorganized has paid the interest on its debt but no dividends; the surplus earnings being all expended in improvements. The road is in a fine state of repair and efficiency, well supplied with motive power, but still making use of leased cars through the National Despatch Line. The line of road is through a sparsely populated country, with no large towns, and where the industry is mainly agricultural. For many years the population has been nearly stationary in numbers, but the wealth of the people has been steadily increasing, and to this increase the railroads have no doubt largely contributed; perhaps it is not too much to say that they have rendered it possible. There is not local traffic along the line of the road to enable the company on any possible tariff to maintain a first class road, and its managers before and during the receivership directed their energies to making it a link in through lines from Boston and other New England towns to Montreal, Detroit, Chicago, and other points in the West. These efforts were successful, and the Central Vermont was recognized by the Trunk Lines as a powerful rival for the traffic between the Mississippi Valley and the seaboard, and was allotted large percentages of the business. But as the line was much less direct than those of the Trunk Line roads and more time was required for the passage of trains over it than between the same points over the other lines, it was compelled to make concessions in rates

to shippers, and the Trunk Lines recognized this necessity and allowed it a differential, as it is called ; that is to say, allowed it to make concessions on west-bound traffic up to an agreed point without its being regarded as a cutting of rates. This differential has been as high as ten cents a hundred pounds on first class freight between Boston and Chicago, and proportional on the lower classes, but so large a differential is not now conceded. The National Despatch Line, however, continues to insist upon it, and its doing so led to the institution of the original proceedings. The carriers forming the Central Vermont lines insist that the differentials they make are necessary to enable them to obtain a fair share of the business ; their rivals deny this and claim that it results in forcing commerce into unnatural channels and in the taking of traffic at unremunerative rates. All this controversy was gone over in the evidence and in argument, with the purpose on one side to estop the Boston and Albany, as an assenting party to the differentials, from making the complaint it now sets up, and on the other to convict the defendant roads of unfairness to their competitors. But all this becomes immaterial to the controversy presented by the complaint of the State Grange. What we are concerned with now are the local rates as they affect local shippers, not the through rates as they affect the rival lines.

One peculiarity of this controversy is that the differentials are not given or taken on east-bound traffic, but, nevertheless, the Central Vermont Line is enabled to obtain its full share of the business. The reasons for this were not brought out on the hearing, but evidently the roads forming that line have been able to give shippers more satisfactory facilities on east-bound than on west-bound traffic. But this also is unimportant now. What is important is the fact that the through business is a necessity to the Central Vermont, if it is to maintain its present state of efficiency. The strictly through tonnage over it for the year ending June 30, 1886, was seventy-nine per cent. of all ; the strictly local tonnage was but five and one-fourth per cent., while what is denominated in the evidence joint freight, that is to say, freight received at points on the line from points beyond its termini, or taken

up at local points to be transported beyond the termini, was fifteen and three-fourths per cent. It is very evident that from these figures that neither on the local traffic alone, nor on that and the joint traffic can a first class road be maintained. It is therefore the right and we may say the duty of the managers of the Central Vermont to obtain and keep up a through business if they can do so without injustice to the local traffic and without violation of law.

No injustice is done to the local traffic by taking through traffic at very low rates, provided the doing so neither makes the local traffic more expensive nor otherwise incommodes it. The defendants put in evidence to show, (1,) that the rates on local traffic are not out of proportion to those charged on through traffic; it being very much more expensive to handle an equal amount of the former than of the latter; (2,) that the through traffic is not carried at a loss, but there are net gains from it in the aggregate exceeding those on the local and joint traffic put together, and that it is by means of these gains that the efficiency of the road is maintained; (3,) that the rates on the through traffic cannot be materially advanced without losing it, and, (4,) that the company cannot afford to reduce the rates on the local traffic. There was strong evidence in support of all these propositions. We are entirely satisfied that a large through business is essential to this line if it is to continue to be a useful line even for local business. We are also satisfied that the people of Vermont are largely interested in the low rates on the long haul traffic, not only because to some extent they send manufactured articles to distant points, but much more because Vermont relies very largely on the West for grain, flour, meats, and provisions. It is highly probable that if the people of that State pay high rates on local traffic they are fully compensated in the low rates on long haul traffic. A board having full power to adjust rates as circumstances should seem to require might perhaps so hold.

But our power in this regard is restricted by the terms of the law which absolutely forbid a carrier "to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property under substantially similar circumstances and conditions for a shorter

than for a longer distance over the same line in the same direction, the shorter being included within the longer distance." This is the law which governs our action, and it cannot be departed from by us on considerations of equity or of what would be for the interest of parties concerned. If parties complain of a violation of the law we can only pass upon the charge preferred, and our action cannot be affected by the circumstance that the rates as adjusted are on the whole to their advantage. They must judge of their interest, while we are to judge of the violations of law which are complained of.

The controversy in the case, then, is narrowed to this question: Are the circumstances and conditions under which the greater charges are imposed on the short haul traffic substantially dissimilar to those under which the lesser charges are imposed on the long haul traffic? If not, such greater charges are illegal, and we have no authority to make them otherwise.

The defendants undertook to show that the circumstances and conditions were substantially dissimilar. The evidence of the difference in cost was very justly relied upon, for cost is a very important condition to traffic. This difference fairly justifies a considerable difference in the rates, but we are not satisfied that it will support the difference actually made. The cost of different kinds of traffic cannot possibly be arrived at with accuracy; at best only an approximating estimate can be made. The calculations put in evidence do not satisfy us that the same kind of freight can be taken from Boston through St. Albans to Detroit at a less cost than from Boston to St. Albans, or from Boston through Ogdensburgh to Chicago and Milwaukee at a less cost than to Ogdensburgh. Honest calculations are made to show such a result, but they are very likely to charge upon local traffic exclusively items which ought to be apportioned, or to leave something out of view which ought to be considered.

The main reliance of the defence, however, was upon a showing of the competition which defendants must meet in long haul traffic. It was shown that for traffic between Boston and the West there was actual or possible competition by steamers to Portland and thence over the Grand Trunk

by steamers to Halifax, and thence over the Inter-colonial by the Southeastern Road to connect with the Canadian Pacific by the several trunk lines and by combinations of carriers requiring no special mention.

The evidence, however, is entirely conclusive that the competition which is troublesome to the defendants is that of the Trunk Lines. It is from these that the defendants demand the differentials, and it is because they are possessed of the shorter lines that the differentials become necessary. The defendants do not fear the competition of a route by Halifax or of any of the other circuitous routes that can be organized, and such lines do not constitute circumstances or conditions having any perceptible bearing on the present controversy. The circumstances and conditions that must justify the greater charge on the shorter haul over the Central Vermont Line must be such as spring from the trunk line competition.

In *The Matter of the Louisville and Nashville Railroad Company* we expressed the opinion that there might be cases in which the competition between railroads, even when they were all subject to the jurisdiction of the Commission, would present such dissimilarity of circumstances and conditions between long haul and short haul traffic as to justify the greater charge on the shorter haul on the same line in the same direction. But our published opinion shows that we thought the case must be rare and quite exceptional. The trunk lines are all subject to our jurisdiction. What then are the peculiar circumstances and conditions which constitute the difference between the case before us and cases of railroad competition in general?

The principal difference must be found in the fact that the Trunk Lines have interior or shorter lines as compared with the line of the defendants, and the latter are compelled, therefore, to make very low rates on their through traffic. This is a necessity of the situation. But it is a necessity which exists wherever long and short lines compete; the long line must accept the rates made by the short line, and perhaps make concessions from them. In this respect there is nothing peculiar in the position of these defendants; there are roads in every part of the country which can make the same

claim they do with the same justice. It is a claim that could be advanced wherever a route, however circuitous, could be formed for long-haul traffic. A line from Boston to Detroit, for example, might be formed by way of the Chesapeake and Ohio Railway, and one from Chicago to St. Louis by way of St. Paul. The greater the departure from a direct line, the greater would commonly be the necessity for low rates on through traffic, and the greater the liability to have the charges on the local traffic increased to make the carriage of through traffic possible. But, without enlarging on this branch of the case, we content ourselves with saying that such peculiar facts are not found to exist in this case as will justify the greater charge over the shorter line.

There remains for us only the duty to make and issue the order which the facts found require. The Central Vermont and the other defendants concerned with it in interstate traffic between Boston and St. Albans and Boston and Ogdensburgh, respectively, including those points, must wholly cease and desist from charging or receiving in respect to any part of such traffic a greater compensation for transportation of a like kind of property for a shorter than for a longer distance over the same line in the same direction, the shorter being included within the longer distance. In performing this duty we neither do nor with propriety can express opinion upon the intrinsic reasonableness or justice of the rates heretofore imposed, except to this extent, that we do not think it was shown by the evidence that when the local tariffs are made to conform to the letter of the law as above directed they will be unreasonable.

In this opinion all concur.

On filing this report and opinion the following order was entered:

These three cases having been brought on to be heard at Rutland, in the State of Vermont, on documentary and oral testimony, and counsel having been heard on behalf of the respective parties, that is to say, Mr. Samuel Hoar for the complainants in the first two cases, Mr. George F. Edmunds

and Mr. Haskins, of Haskins & Stoddard, for the complainant in the third case, and Messrs. B. F. Fifield and A. A. Strout for the defendants; and due deliberation having been had, and the report and opinion of the Commission being now filed—

It is now ordered and adjudged that the Central Vermont Railroad Company and the other defendants concerned with it in interstate traffic between Boston, in the State of Massachusetts, and St. Albans, in the State of Vermont, or between Boston aforesaid and Ogdensburgh, in the State of New York, including those points respectively, do and shall wholly and immediately cease and desist from charging or receiving, in respect of any part of such traffic, a greater compensation for the transportation of a like kind of property for a shorter than for a longer distance over the same line in the same direction, the shorter being included within the longer distance.

And it is further ordered that a copy of this order, with notice requiring obedience thereto, be forthwith sent to each of the defendant corporations, and that at the same time there be also sent to each of such defendants a copy of the report and opinion of the Commission above referred to.

GEORGE M. JACKSON *v.* THE ST. LOUIS, ARKANSAS AND TEXAS RAILWAY COMPANY.

Decided October 12, 1887.

Petitioner complained of a certain rate as excessive. He also complained of unjust discrimination in respect to that rate. Defendant answered that its rate was not what petitioner supposed, but was a certain charge very much less, and also denied the alleged unjust discrimination. Petitioner did not further appear in the case, and did not respond at the hearing. Held, that it must be assumed on these facts that he was satisfied with the answer.

No appearance for complainant.

A. C. Stuart, for defendant.

MEMORANDUM.

The petition in this case was filed June 8th, 1887. The principal complaint seemed to be that the defendant refused to ship hewed ties for petitioner from St. Francis, in the State of Arkansas, to Kansas City for less than forty and one-half cents each, which was averred to be an unreasonable and unjust charge. It was also complained that defendant discriminated in its rates unjustly as between sawed ties and hewed ties to the prejudice of the latter.

Defendant filed its answer June 28th, 1887, in which all unjust discrimination as between hewed and sawed ties was denied. It was further denied that defendant had ever made a charge of forty and one-half cents each for the transportation of ties from St. Francis to Kansas City, but it was averred that the charge had been forty cents prior to May 23d, 1887, when it was reduced to thirty-three and one-half cents, at which it remained when the complaint was filed.

A copy of this answer was sent to complainant, and he has not since been heard from by the Commission. Notice that the case would be heard this day was sent to him, but he has not appeared. The defendant appeared by counsel. Under the circumstances we must assume complainant is satisfied with the answer, and the case is dismissed.

LEVERETT LEONARD *v.* THE UNION PACIFIC
RAILWAY COMPANY.

Heard October 18, 1887.

When issues of fact are made by the pleadings and no proofs are offered, no relief can be granted on such issues.

The complaint charged unjust discrimination in rates. The answer admitted the discrimination, denied that it was unjust, and assigned reasons for making it. On the case being brought to a hearing on the pleadings and submitted without evidence, it was held that since it was impossible to say that there might not be facts to support the discrimination, that the case must be dismissed, but without prejudice.

On May 21st, 1887, the complainant presented his petition, stating that on the 14th day of April, 1887, he delivered to

the authorized employees of the defendant at its station at Kansas City, Missouri, twenty-six head yearling pure-bred stock cattle, in the Burton Feeding and Watering Stock Car, No. 47, said car being owned and operated by the Burton Stock Car Company, of Boston, Mass., and that the said cattle were consigned by and to himself to Pueblo, Colorado, on sale ; that the defendant charged the petitioner for the transportation of said stock thirty-eight per cent. in excess of the regular rate between the same points in cars owned and operated by defendant ; that the petitioner protested against the same, and was thereupon referred to that portion of the Western Classification relating to " The Transportation of Live Stock in Special or Palace Cars ;" that the petitioner then demanded to be supplied with an improved feeding and watering stock car, suitable for the safe and prompt transportation of above mentioned pure-bred stock, and was informed that the defendant did not own any such cars, and only supplied the common live stock cars. The petition further alleges that the common stock cars supplied by the defendant are wholly inadequate for the comfortable and safe transportation of valuable pure-bred stock, and have no appliances for feeding and watering animals upon the cars. The petition prays that the defendant be compelled to refund the said excess charge of thirty-eight per cent, above the regular rates, and that all railroads be required to supply suitable improved live stock cars, provided with adequate appliances for properly feeding and watering horses and cattle while in transit, or that, failing to do so, they shall receive live stock in cars of like description when offered, at the same rates which they receive for transporting the same kind of traffic, the same distance, in their own cars, and without charging any excess for the use of said improved cars.

The answer of the defendant admits that application was made to its agent at Kansas City for the transportation of twenty-six head of cattle in a Burton stock car, from Kansas City, Missouri, to Pueblo, Colorado, via Denver, Colorado, and says that the freight rate upon such a car, so loaded, from Kansas City to Denver was explained to the petitioner ; that said car was a Burton Palace Stock Car, of the ordinary size,

and thirty-six feet in length, internal measurement ; that the rate upon ordinary stock cars, thirty feet in length, as used by railroads generally, was \$72.50, and that under the Western Classification, adopted by the western roads through the Western Classification Committee, the rate at the date of said shipment on live stock palace cars, thirty-six feet in length, internal measurement, was one hundred and thirty-eight per cent. of the regular tariff rate, that is to say, \$72.50 per car ; that the petitioner did not at the time object to the said rate, and the only difference which arose then, or at any time prior, related to the issuance of a free pass to petitioner by defendant, from Kansas City to Denver, which was refused, and to this the petitioner objected, and defendant had no knowledge of any dissatisfaction respecting said shipment, or claim for refunding of any alleged excess in the rate, until the filing of the petitioner's complaint. The defendant denies that the said charge was in violation of the "Act to Regulate Commerce," and also denies that any demand was made upon it to furnish the petitioner with an improved feed and watering stock car suitable for the safe and prompt transportation of high-bred stock, or that complainant was informed that the railway company did not own such cars, and says that the statements of complainant in that particular are untrue in fact ; that its stock cars, in ordinary use, are well built and substantial and in every respect fit for the transportation of live stock, as such business is ordinarily conducted by western roads ; that the said Burton stock car is a species of palace stock car, not owned by any railroad company, but by the Burton Stock Car Company, a private corporation, which provides cars for shippers of live stock, and receive therefor a fee separate and apart from any payment for the transportation of said car and its contents ; that the tendency of such private ownership and profit upon such cars hauled by railway companies is to absorb and divert a part of the legitimate railway business into the pockets of private corporations and individuals, who deny any obligation as common carriers to the public or the government. The defendant further states that, in the transaction complained of, it has afforded the petitioner equal advantages and facilities without

preference or discrimination to persons or corporations similarly situated, and that the charges made were reasonable and just. It submits, also, that it is not under any legal obligation, either of common law or by construction, to receive and transport over its road trains, cars, or vehicles owned by private parties or corporations, whether tendered by the owners thereof, or by the hirers thereof, not operating railways as common carriers, and not exchanging passengers, freight or other cars with respondent as common carriers.

The case having been this day assigned for hearing—

M. J. Foote appeared for the petitioner and made an argument, claiming that upon the pleadings petitioner was entitled to the relief prayed.

J. S. Blair and Shellabager & Wilson, for defendant.

No proofs were offered.

BY THE COMMISSION.

The pleadings in this case present clear issues of fact. It is impossible to dispose of these issues by a decision which shall reach the merits without some evidence upon which to base it. We cannot assume that the higher rates charged for transporting the Burton cars constitute unjust discrimination when the fact is denied in the pleadings and is not proved. Whatever doubts we may have on the subject in the absence of proofs, it is impossible for us to say that if all the facts were before us the greater charge could not be justified. In the case brought by the Burton Stock Car Company against the Chicago, Burlington and Quincy Railroad Co. and others, and heretofore heard by us, considerable evidence was put in by the defendants in justification of the greater charge; and while we could not say it was entirely convincing, neither on the other hand could we say that unjust discrimination was fairly made out. The case was therefore retained for further proceedings in case the parties should see fit to take them. In this case, however, no evidence whatever is presented; and as it is not suggested that further proceedings are desired, the case must stand dismissed, but without prejudice.

CHARLES W. KEITH AND ANOTHER v. THE KENTUCKY CENTRAL RAILROAD COMPANY AND OTHERS.

Tried July 19—Decided October 21.

A common carrier of live stock is subject to the legal duty to provide reasonable and proper facilities for receiving and discharging from its cars such live stock as is offered for transportation, free of all except the customary transportation charges. It does not fully discharge this duty by receiving on and discharging from its cars live stock at a depot access to which must be purchased.

A railroad company as carrier of live stock had undertaken to give to a stock yards company an exclusive right at one of its stations, and to require all stock at that station to be received and delivered on the platform of the chutes of that company; the company being authorized to charge lottage therefor. Complainants established by the track of the railroad company chutes of their own, through which they demanded the right of receiving and delivering the stock of themselves and their customers. The conveniences furnished by them being suitable, it was held that their demand must be complied with.

Where suit is pending involving to some extent the question presented by petition to the Commission, the pendency thereof will not be deemed sufficient reason for the Commission declining to make an order, when it is seen that the judgment of the court when rendered will not necessarily cover the ground of the petition; but leave will be given either party to apply for a modification of the order should a modification be necessary to make it conform to the judgment when rendered.

This case being brought on to be heard on petition and answers thereto by the several defendants, oral testimony was taken on the issue so far as related to the Pittsburgh, Cincinnati and St. Louis Railroad Company, and the case as to the other defendants was submitted on the following stipulation :

For the purpose of trying the issues in the above cause now pending before the Interstate Commerce Commission the following facts are agreed and shall constitute all the evidence to be heard upon said trial, in addition to such uncontroverted statements of fact as are contained in the complaint and the answers.

1. The complainants are partners engaged in the business of live stock brokerage, buying, selling and shipping live stock from Covington, and are proprietors of stock yards at Covington, Kentucky, situated near the line of the Kentucky

Central Railroad track, suitable and convenient for receiving and shipping live stock from and upon said railroad, the free use of which they have offered to said railroad companies, the respondents, for either the receipt or delivery of stock to and from all persons desiring to use the same.

2. The tripartite agreement between the railroads (filed here with as exhibit A) was observed by all the parties and by the Louisville and Nashville as purchaser of the Louisville, Cincinnati and Lexington, and by the Kentucky Central Railway Company as successor of the Kentucky Central Railroad Company.

3. The Covington Stock Yards Company had a contract (the same filed with the response of the Kentucky Central Railroad Company herein) and the validity and construction of same was duly ordered to be litigated by interpleader between the Covington Stock Yards Company and Keith and Wilson in a case to foreclose a mortgage on the Kentucky Central Railroad in the United States Circuit Court for the District of Kentucky, and was there so litigated, and is now pending on appeal to the Supreme Court of the United States.

The questions there involved were whether the contract was valid to give the Covington Stock Yards Company exclusive right to keep live stock chutes and yards on right of way of the railroad, and whether it might charge Keith and Wilson or their customers anything for merely transmitting live stock through its yards to and from the public highway, and whether the railroad company could establish any other live stock depot at Covington. But the said railroad company had not proposed to establish any other at Covington. (If the Commission will consider that record—No. 1347, *Covington Stock Yards Company v. Keith et al.*, it will find the printed record in Supreme Court U. S.)

4. The extra charges alleged as discriminations were made by W. A. Peters for the benefit of the Covington Stock Yards Company, of which he is superintendent, and went to the treasury of that company and not to any of the railroads.

5. W. A. Peters is also agent at the Covington Stock Yards Station for each of the railroads, and reported separately to each company his acts for that company.

6. Bills of lading, or shipping contracts of the Pittsburgh, Cincinnati and St. Louis Railroad Company, only were issued by him for stock of Keith & Wilson or their customers to any point outside of Kentucky, and stock from similar points was only receipted for in like manner.

7. Stock billed in the name of the Kentucky Central Railroad Company is delivered to and received from Keith and Wilson at their own chutes, but not by Peters. Stock billed in the name of the other railroad companies is delivered and received only at Covington stock yards.

8. The Kentucky Central Railroad Company has always been willing to receive and ship stock for Keith & Wilson at the general freight depot at Covington free from terminal charges; but same is very inconvenient to both, and that freight depot has not been used for receiving live stock only in exceptional cases.

9. W. A. Peters, the manager of the Covington Stock Yards, has been instructed by the Stock Yards Company to collect yardage or lottage on all stock passing through said yards for market shipped to or from Covington; but none for stock not apparently intended for market, and none for stock transmitted immediately through Covington.

He has never charged the complainants, nor would he now charge them, lottage or yardage on any stock not apparently designed for market nor for any stock transmitted immediately through Covington and not kept or housed at complainants' yards.

Before the 8th day of May, 1886, no charge had been made to any one for passing stock through said yards, whether intended for market or not, nor whether immediately transmitted through Covington or not. At or about that time, the complainants having established their yards in opposition to the Covington Stock Yards, said Peters issued to the complainants a notice in writing that "on and after that date they would be required to pay lottage upon all stock unloaded at the Covington Stock Yards and taken to their yards," and such charges have been imposed upon them ever since, but upon no other persons except in two instances where such charges were collected from others.

In all cases where stock has been kept at complainants' yards and then offered for shipment over the roads of defendants charges for passing through the Covington Stock Yards are imposed—otherwise no such charge has been made, except in the two instances above mentioned, and no other instance has occurred for the enforcement of said instructions.

Said Peters, as the agent of said railroad companies, has had no office at the platform of complainants nor any force there to load or unload cars and has no authority to act as agent for said roads at any other point than the said Covington Stock Yards.

The loading and unloading of cars at complainants' chute interferes with and impedes the loading and unloading at the Covington Stock Yards.

10. Since the 5th day of April, 1887, the agent of the Pittsburgh, Cincinnati and St. Louis Railroad Company, respondent, refuses to receive stock from complainants for shipment over respondents roads except through the Covington Stock Yards.

He refuses to have the cars of said respondent set in to complainants' platform without the order of the Kentucky Central Railroad Company, and the latter says it will so set the cars in if the said agent so directs, and he refuses to so direct.

11. All live stock transported by the Louisville and Nashville Railroad Company to Covington, however consigned is contracted to be delivered at the Covington Stock Yards. The Louisville and Nashville Railroad Company pays the Stock Yards Company fifty cents per car for unloading.

We concur in the above statement of facts this July 8th, 1887.

James O'Hara, for complainant.

K. F. Hallam, for Kentucky Central Railroad Company.

E. Baxter, for Louisville and Nashville Railroad Company.

J. T. Brooks, for Pittsburgh, Cincinnati and St. Louis Railroad Company.

REPORT AND OPINION OF THE COMMISSION.

MORRISON, *Commissioner* :

In this case it is alleged that the railroad companies, against which complaint is made, have denied and continue to deny and refuse to Keith & Wilson, complainants, reasonable and proper facilities for receiving and forwarding live stock over said companies' several lines of road, separately, and in their connections with each other, and that said railroad companies subject said Keith & Wilson to the payment of terminal and discriminating charges not imposed on other shippers of a like kind of property.

The facts appearing from the agreement of parties and testimony heard are found to be :

1. The complainants are partners buying, selling and shipping live stock, and are the proprietors of stock yards at Covington, Kentucky, convenient for receiving and shipping live stock from and upon the Kentucky Central Railroad, the free use of which yards the complainants have offered to the defendant railroad companies and at which live stock is housed, fed, and cared for at lower rates than is done by the Covington Stock Yards Company, whose yards and the yards of Keith & Wilson, are near each other on the same live-stock switch.

2. The defendants are common carriers of passengers and freight, including live stock, to and from Covington, Ky., and, through their connections with each other, from Covington, Ky., to Cincinnati, Ohio, and thence to Pittsburgh, Pa., for eastern markets. The Covington Stock Yards—the depot for live stock on the line of the Kentucky Central road used by all the defendants—are reached by the cars of the other defendant railroad companies over a switch or branch extending from the Kentucky Central to the Louisville and Nashville road at Milldale or South Covington, over which the cars from the Louisville and Nashville and the Pittsburgh, Cincinnati and St. Louis roads pass to the Covington Stock Yards; the cars of the Pittsburgh, Cincinnati and St. Louis Railroad pass to and from its southern terminus at Cincinnati, over the Louisville and Nashville track to Milldale.

3. The defendant, the Pittsburgh, Cincinnati and St. Louis Railroad Company, with other railroad companies, to which the other defendants are successors, had stipulated with the Covington Stock Yards Company to make its yards with chutes leading thereto, on the line of the Kentucky Central Railroad, their exclusive depot for live stock at Covington, Ky., for the term of fifteen (15) years from November 19, 1881; the validity and construction of which stipulation had been litigated in the U. S. Circuit Court for Kentucky, and is now pending on appeal in the U. S. Supreme Court, and before such litigation the stipulation was observed by all the parties.

4. W. A. Peters was and is the superintendant of said Covington Stock Yards Co. and agent at the Covington Stock Yards and station for, and reports separately to, each of said defendant railroad companies, and the charges alleged as discriminations, were made by him for the benefit of the Covington Stock Yards Co. and went to its treasury.

5. Said Peters, as manager of the Covington Stock Yards Co., has been instructed by it to collect "lottage" on all stock passing through said yards for market, shipped to and from Covington, but none for stock not intended for market and none for stock transmitted immediately through Covington and not kept or housed at complainants' yards.

6. No charge was made to anyone for passing stock through said Covington Stock Yards before May 8, 1886, about which time complainants established their yards in opposition to the Covington Stock Yards, and at which time said Peters issued a notice in writing to complainants, that "on and after that date they would be required to pay yardage on all stock unloaded at the Covington Stock Yards and taken to their (complainants') yards," and since then such charges have been uniformly imposed on complainants, and, in two instances, the only occurring occasions of their imposition, on others.

7. The Kentucky Central Railroad Company has always been willing to receive and ship stock for Keith & Wilson, at the general freight depot at Covington free of terminal charges, which could only be done with such inconvenience

to both, that the freight depot has been used for receiving live stock only in exceptional cases.

Since said stipulation was litigated in the U. S. Circuit Court for Kentucky, stock billed in the name of the Kentucky Central road is delivered to and received from Keith & Wilson at their own platform and yards, but not by or through the agent Peters. Stock billed in the name of the other defendant railroad companies is delivered and received only at the Covington Stock Yards.

The Kentucky Central Railroad Company protests it has the legal right to resume delivery of all live stock at the Covington Stock Yards arriving at Covington, and that it may do so at any time unless the judgment of the Commission shall be adverse to the existence of such right.

All live stock transported by the Louisville and Nashville Railroad Company to Covington, however consigned, is contracted to be delivered at the Covington Stock Yards.

Since April 5th, 1886, the Pittsburgh, Cincinnati and St. Louis Railroad Company, defendant, refuses to receive stock from complainants for transportation over its road except through the Covington Stock Yards.

8. The questions litigated in the United States Circuit Court, and now pending on appeal in the United States Supreme Court, involved the right of the Covington Stock Yards Company to charge Keith & Wilson, or their customers, at all for merely transmitting live stock to and from the public highway; whether the contract was valid to give the Covington Stock Yards Company the exclusive right to keep live stock chutes and yards on right of way of the railroad, and whether the railroad company could establish any other live stock depot at Covington. But the said railroad company had not proposed to establish any other at Covington.

The defendants answering separately, each for itself, denies that it has, by itself or through its connections, refused to complainants any reasonable or proper facilities, or subjected them to any terminal, discriminating or unreasonable charges as alleged by them.

In justification of this denial it is urged—that the defendants performed their whole duty to the public as carriers of

live stock, by receiving and delivering the same, as they were accustomed to do and had done, on the platform at the chutes of the Covington Stock Yards; that the discriminating and terminal charges complained of, were imposed by the Covington Stock Yards Company for its own use—that, while it was more convenient for defendants, the public was reasonably well and better served than it otherwise could or would be but for the arrangement by which defendants made the Covington Stock Yards their exclusive depot for receiving and delivering live stock.

In this view, so ably and plausibly presented as it has been, we are unable to concur. The Covington Stock Yards, less complete than they are present, were established and under different ownership, were in operation many years previous to the stipulation or arrangement for their use by defendants, or any of them. This arrangement was, no doubt, made with the well-meant purpose at the time of securing better terminal and improved stock yard facilities. It may, at the time, have stimulated the improvement and betterment of the yards, and in that way was beneficial, in some measure, to the general public. But that such considerations justify the defendants, or any of them, in making the yards of the Covington Company their exclusive live stock depot, thus enabling the Covington Company to exact payment of those who are not its customers for the privilege of passing stock to and from the cars of defendants, we do not believe. The justification of such exaction is contradicted by the fact that, near to and on the same live stock switch with the Covington Stock Yards, are the yards of the complainants where the public may be suitably well served at considerably lower rates than the rates of the Covington Company. The complainants, as proprietors of stock yards and in their desire and effort to serve the public in that capacity, have the right to be the rivals of the Covington Stock Yards Company, and such of the public as desire to patronize the complainants, have both the right to do so and to have their stock shipped on equal terms and for like charges as those who patronize the Covington Yards.

As common carriers of live stock, it is the legal duty of the defendants to provide reasonable and proper facilities for re-

ceiving on board and discharging from their cars, all live stock offered for shipment or brought over their respective roads, and their connections to or from the city of Covington, Ky., free of charges other than the usual transportation charges. It is not believed that this legal duty and obligation of defendants is fully discharged by receiving on, and discharging from their cars live stock at a depot, access to which must be purchased. And the complainants are entitled to ship and receive live stock over defendants' roads and on defendants' cars, to and from Covington, free from any other than the customary transportation charges.

The general freight depot, used as a live stock depot in exceptional cases, is admitted to be unsuited for such use; the exaction and demands for passing through their yards made by the Covington Company of the complainants and those who patronize complainants' yards, prevent complainants and their customers from shipping or receiving live stock on equally favorable terms with the customers of the Covington Company. Until the defendants provide some other suitable and convenient place at Covington, where the complainants may ship and receive live stock free from other than the customary transportation charges, the defendants should be and will be required to receive from and deliver such live stock to complainants at their own yards.

This conclusion of the Commission is in accordance with the judgment and order of the Circuit Court of the United States for the district of Kentucky, in the case of Geo. T. Bliss and Isaac F. Gates, complainants, against the Kentucky Central Railroad Company, which involved the question of the right of the Covington Stock Yards Company to charge Keith & Wilson, complainants, for passing stock through the Covington Stock Yards and which right is involved in that case now pending on appeal in the U. S. Supreme Court.

It is submitted by the defendant, the Kentucky Central Railroad Company, in view of the pendency in the Supreme Court of the United States of the suit on appeal, involving the validity of the contract and the right of the Covington Stock Yards Company to charge Keith & Wilson for passing

through the yards of said company and the chutes leading therefrom to the platform and cars of the defendants, that no further action be taken, in the matter under consideration, until the determination of said suit. We do not concur in this view.

If the stipulation or contract between the defendants or any of them and the Covington Stock Yards Company should be held valid so as to give the Covington Stock Yards Company a right of action against the railroad company for the breach thereof, or if it should be adjudged that the Covington Stock Yards Company could, by reason of rights acquired by said contract exact payment of complainants for passing their stock through the yards of the Covington Company, this would not necessarily determine the question which is in controversy here, namely, the right of the defendants to subject the complainants to such lottage charges by making the Covington Stock Yards the exclusive depot for delivering or receiving live stock shipped to or from Covington. On the other hand, should it be held in the pending suit that, under said stipulation the Stock Yards Company had no right to demand payment of complainants for so passing stock through their yards, the order, in this case, which would be to the same effect, would be no longer important. It is not, therefore, perceived how a determination by us of the question in controversy here between complainants and defendants can lead to embarrassment, or injuriously affect any rights, which, in the Federal courts, may eventually be found to exist.

Yet, that no possible injury may result to the parties, and that the orders of the Commission may conform to the final determination in said suit, leave should and will be given to either of the parties to this proceeding, to apply for a modification of this order at any time after such final determination.

DAVID F. ALLEN AND ANOTHER v. THE LOUISVILLE, NEW ALBANY AND CHICAGO RAILROAD COMPANY.

Heard September 20, 1887.—Decided October 31, 1887.

A violation of the "long and short haul clause" of the Act to Regulate Commerce is not made out by showing that a carrier, when called upon by a consignor for through rates, names such as are greater for the shorter distance and receives the amount for itself and its connections, when it appears that on its own line the charges are the greater for the longer distance, and the through charges by the shorter line are only made greater by the fact that the connecting road which has the shorter line makes higher rates than the connecting road which has the longer line.

Defendant has a line of road from New Albany to Michigan City, on which it receives grain for the New York market and delivers it to direct eastern lines, which receive it at the rates prevailing at the points where it is taken up, and pro rate with defendant on a mileage basis. The prevailing rates at Indianapolis, which is one of these points, was twenty-three cents per hundred pounds; when at Frankfort, which is another, it was twenty-five cents. Defendant received grain at Indianapolis and delivered it to the Michigan Central at Michigan City, and it also received grain at Frankfort and delivered it to the New York, Chicago, and St. Louis, at South Wanatah. The distance from Indianapolis to New York, by way of Michigan City, is greater than from Frankfort to New York, by way of South Wanatah. A dealer at Frankfort delivered grain to defendant to be carried to New York, and was charged twenty-five cents a hundred for the transportation by way of the connecting road at South Wanatah, while at the same time defendant was giving to shippers the twenty-three cent rate by the other route at Indianapolis. But it appeared that defendant had nothing to do with making the rates beyond its own line except as it agreed to accept its proportion on a mileage basis, and that its own compensation for taking grain from Indianapolis to Michigan City, and also from Indianapolis to South Wanatah, was greater than the compensation received for taking like freight from Frankfort to South Wanatah. These facts show no violation by defendant of the long and short haul clause of the fourth section of the Act to Regulate Commerce.

Where the purpose of a complaint is to compel a reduction of through rates from a western point over several roads to a seaboard city, all the roads constituting the line should be parties; it is not enough to make the road which first receives the freight a party, even though it also receives the compensation for all, where it is shown that it has no control of the rate beyond its own line, because an order directed only to that road would be ineffectual to accomplish the desired end.

Complaint heard at the Board of Trade rooms in Chicago on depositions and oral evidence.

The complaint states that on the 20th day of June, 1887, the complainants delivered to the defendant one car-load of bran for transportation from the city of Frankfort, in the State of Indiana, to the city of New York, for which service the defendant demanded compensation at the rate of twenty-five cents per hundred pounds; that the city of Frankfort and the city of Indianapolis are both upon the line of defendant's road, that Frankfort is forty-seven miles nearer New York than is Indianapolis, and that all freight from Indianapolis to New York over defendant's road must necessarily pass through Frankfort; that at the date of said shipment defendant's tariff on property of the sixth class—which included bran—from Indianapolis to New York was twenty-three cents per hundred pounds; and that, therefore, by reason of such greater charge from Frankfort to New York, the shorter distance, than from Indianapolis to New York, the longer distance, defendant violated section four of the "Act to Regulate Commerce."

The answer of the defendant admits that on the day named its tariffs from Indianapolis and Frankfort to New York were respectively, twenty-three and twenty-five cents per hundred pounds, and that Frankfort is forty-seven miles nearer New York by its line of road than is Indianapolis, but denies that it has violated section four of the "Act to Regulate Commerce." The answer shows the comparative distances from Indianapolis, Michigan City, and intermediate points, to New York, via defendant's line and connections, as well as by the shortest line via other routes from the said several points to New York, from which it appears that the distance from Indianapolis to New York by the shortest line is 825 miles, and from Frankfort is 846 miles. It further states that for a long period transportation charges in that section have been, from necessity, based upon relative mileage distances to and from the points of shipment, via the shortest line, and the longer lines have carried at the same rate in the aggregate as the shorter ones; that between Chicago

and the Atlantic seaboard rates have been based upon the distances between those points, Chicago being the unit, and that the rates from Indianapolis to New York and other seaboard points have been and are fixed by the short lines at ninety-three per cent. of the Chicago rate; that defendant's road running in a northwesterly direction towards Chicago and Michigan City crosses several east and west roads, and that in consequence of the distances, via the crossing lines at the junction points to New York and points east thereof, being shorter than by defendant's road, yet further from Indianapolis, each of said junction points has the higher rate to and from New York points and east thereof than Indianapolis; that the rates on sixth class articles from the junction points to and from New York and points east thereof are: Indianapolis, 93 per cent. of the Chicago rate or twenty-three cents per hundred pounds; Westfield, 96 per cent., or twenty-four cents per hundred pounds; and the other junction points, including Frankfort, 100 per cent., or twenty-five cents per hundred pounds. That unless defendant accepts these rates it cannot secure any of the traffic to or from Indianapolis; that in the past it has charged such rates, and if it cannot continue the practice it must lose its Indianapolis business, as defendant has no power to reduce rates in the territory north of Indianapolis below the established rates, because its connections will not receive freight except at the established rate in effect at the point where the same originates. The answer further states that Indianapolis is not only nearer the Atlantic seaboard by direct route than is Frankfort, but that there are running from Indianapolis the following lines of railway, to-wit: Cincinnati, Indianapolis, St. Louis and Chicago; Cincinnati, Hamilton and Chicago; the Pennsylvania Company's lines; Lake Erie and Western; Cleveland, Columbus, Cincinnati & Indianapolis; the Louisville, New Albany and Chicago Railway, all competing for Atlantic seaboard business, and if defendant cannot compete with these lines, or is compelled to charge the same rate from Indianapolis which it charges from Frankfort, it cannot hope to do Indianapolis business. The answer also states that the shipment in question is the only car that the

complainants have shipped by defendant's line to Buffalo, or points east thereof, and that this was merely for the purposes of this action.

Suit & Combs filed a brief for complainants, and *J. C. Suit* argued the case orally.

Haynes & Easley and *George W. Friedly*, for defendant, to the point that the circumstances and conditions of the shipment from Indianapolis and from Frankfort are different, referred to and commented upon *Matter of Louisville & Nashville R. Co. Petition*, 1 Ry. & Corp. L. J. 611, 612; *Complaint of R. J. Richardson & Co.*, 1 N. Y. R. R. Commissioners Rep. 101, 105; *Rand Lumber Co. v. Chicago, etc., R. Co.*, Iowa R. R. Com., Rep. 550, 553; *Ex parte Koehler*, 23 Fed. Rep. 529; same case, 21 Am. & Eng. R. R. Cases, 52; *Greenhood on Public Policy*, 639, 640; *Hadley on Railroad Transportation*, 116, 117; *Report of Simon Sterne*, N. Y. Senate Misc. Doc. 63, pp. 18 & 19; *Illinois Cent. R. R. Co. v. People*, 10 West. Rep. 588. That the lines of transportation are different lines; *East & West Ry. v. Great Western Ry.*, 1 Ry. & Canal Traffic Cases, 344; *M. S. & L. Ry. Co. v. Denely Coal Company*, 14 Law Rep. 223; *Finney v. Glasgow Ry. Co.*, 2 Macy. 183; *Murry v. Glasgow, etc., Ry. Co.*, 11 Ct. Ses. Cas. 4, Sec. 205; *Commonwealth v. Worcester, etc., R. Co.*, 124 Mass. 561.

REPORT AND OPINION OF THE COMMISSION.

COOLEY, *Chairman*:

The complaint in this case is that the defendant violates the fourth section of the Act to Regulate Commerce by charging more for the transportation of a like kind of property for a shorter than for a longer distance over the same line in the same direction, the shorter being included in the longer distance.

The facts as we find them to be on the evidence are the following: The defendant has a line of railroad extending in a direction west of north from New Albany to Chicago, with a branch line from Monon to Michigan City. The line

is crossed at many points by roads which form lines to New York and other Atlantic seaboard cities. Among the points where there are such crossings are Indianapolis, Frankfort and South Wanatah, in the State of Indiana. The branch from Monon intersects the Michigan Central Railroad at Michigan City. Defendant's road is through a grain growing region, from which wheat and products of wheat are taken to the seaboard. The direct roads from the points on defendant's line to the Atlantic cities determine the rates that shall be charged for the transportation, and other roads that participate with them in the business accept the rates so fixed, apportioning it on some agreed basis.

The complainants are dealers in grain and grain products at Frankfort, and buy for the eastern market. The current rate from Frankfort to New York is twenty-five cents a hundred pounds. From Indianapolis to New York, the distance by direct lines being somewhat less, the rate is only twenty-three cents a hundred pounds. The management of the defendant is desirous of participating in the grain carrying trade, but to have any part in the east-bound traffic it must carry at such rates that the whole charge to the seaboard over all the roads forming a line of transportation shall be the current rate at the point at which the traffic is received. The roads crossing the defendant's road are willing to receive the traffic from it and divide the compensation by pro rating on a mileage basis. Defendant has an arrangement with the Michigan Central Railroad Company whereby it receives grain at Indianapolis at the twenty-three cent rate and delivers it to the Michigan Central at Michigan City, pro rating the compensation, and another with the New York, Chicago & St. Louis Railroad Company whereby it receives grain at Frankfort at the twenty-five cent rate and delivers it to the last-named road at South Wanatah, pro rating the compensation. The result is that the rate given by defendant to shippers at Indianapolis by the Michigan Central line is less than the rate given at Frankfort by the other line, though the distance by the former line is greater.

This proceeding is instituted to compel reduction in the

rate at Frankfort to the level of the Indianapolis rate. The complainants do not usually send grain by defendant's road, but they sent a consignment of grain product by it and paid the twenty-five cent rate under protest, with a view to this proceeding. It is not claimed that the direct line from Frankfort to New York violates the law by charging the twenty-five cent rate, but it is supposed that if defendant is compelled to reduce its rate by the order of the Commission, the direct line will have no alternative and must make the like reduction. In fact since this proceeding was begun a reduction to twenty-four cents has been made.

The distance from Indianapolis to New York by the shortest railroad line is eight hundred and twenty-five miles. From Frankfort the shortest railroad route is eight hundred and forty-six miles. From Indianapolis to Michigan City is one hundred and fifty-four miles, and from Indianapolis to New York, by way of Michigan City and the Michigan Central Railroad, is one thousand and fifty-five miles. From Frankfort to South Wanatah is eighty-four miles, and from Frankfort to New York, by way of South Wanatah and the New York, Chicago and St. Louis Railroad, is one thousand and eight miles. These figures give a basis for such calculations as are necessary to an understanding of the legal propositions.

On the hearing the general question was discussed, whether the transportation of grain to the seaboard, through the agency of the defendant, is under circumstances and conditions so different at Frankfort from what they are at Indianapolis as to justify the greater charge on the shorter haul. For the defendant it was contended that they were; Indianapolis being not only a point of greater railroad concentration and competition, but also nearer New York by the direct lines and therefore justly entitled to the lower rates; while for the complainants it was insisted that business over the line of the defendant is alone in question, and by that line Frankfort being nearer the points of freight destination is entitled by the law to rates not higher than those accepted by the defendant at Indianapolis.

On the facts found, however, it is very evident that the

general question the complainants have desired to present does not arise. The defendant transports grain from Indianapolis to Michigan City, but no further, and receives for the transportation a proportion of twenty-three cents per hundred pounds measured by the distance it carries it, 154 miles, as compared with the whole distance, 1,055 miles. It also transports grain from Frankfort to South Wanatah, and receives for the transportation a proportion of twenty-five cents per hundred pounds measured by the distance it carries it, 84 miles, as compared to the whole distance, 1,008 miles. An arithmetical calculation will readily show that while defendant receives somewhat more per mile upon the grain taken up at Frankfort, it receives more in the aggregate for that which it carries from Indianapolis to Michigan City than for that it carries from Frankfort to South Wanatah, and therefore does not violate the statute which prohibits receiving more for the shorter than for the longer haul. If the calculation were made on the Indianapolis shipment for the distance between that place and South Wanatah only, the fact would still be that more is received upon that than upon a like consignment from Frankfort; the distance being forty-eight miles greater. Since, therefore, the distance between Frankfort and South Wanatah is all that is included in the longer line, it is plain that on no calculation is it made to appear that the defendant receives more for the transportation of a like kind of property over the same line in the same direction, the shorter being included within the longer distance; and this without regard to the question raised on the argument, whether the line from Indianapolis by way of Michigan City to New York on which the twenty-three cent rate is charged is or is not in a legal sense the same line as that from Frankfort by way of South Wanatah to New York, on which the twenty-five cent rate is charged. We say nothing upon that question, because the case does not call for its consideration, and also because only one of the several parties interested in the question has been brought in as defendant and given the opportunity for a hearing.

But it is argued for the complainants that defendant unites with the other carriers in making the through rate, and is

therefore responsible for the whole as much as if the whole was for a transportation over its own line. On this point we are necessarily governed by the evidence, and the evidence is distinct and positive that while the defendant names the through rate to shippers when it is called for, the rate from intersecting points is not controlled by defendant, but is fixed by the crossing roads. The Michigan Central Railroad, it appears, will accept Indianapolis grain from defendant at Michigan City and pro rate the twenty-three cent charge, on a mileage basis, and the New York, Chicago and St. Louis Railroad will accept Frankfort grain from defendant at South Wanatah and pro rate a twenty-five cent charge on a mileage basis. If defendant consents to receive the proportions from the two roads, respectively, it can name a through rate to shippers when they ask for it, but in doing so it does not make the through rate any more than it would if it named its own proportion and that of the other roads in figures separately, and then received, as it now does, the whole ; for in receiving what goes to the other road, it receives it as agent merely. The charge from Frankfort to New York by the defendant's line is greater than the charge from Indianapolis, not because the defendant exacts more for its own service—for the contrary is the fact—but because the Michigan Central Railroad carries from Michigan City at a lower compensation than the New York, Chicago and St. Louis Railroad charges for the transportation from South Wanatah.

There are cases in which a carrier may be bound for some purposes by the rates established over connecting lines, even though it has not directly united with such connecting lines in making them. Such a case was before the Commission in *The Vermont State Grange v. The Boston and Lowell Railroad Co. et al.*, in which one of the defendants shared long haul rates which were lower than the short haul rates which it charged on its own road constituting a part of the long haul line. The legality of the short haul rates was all that was in controversy in that case ; and the Commission held that the carrier exclusively responsible for them was not entitled when fixing them to make them greater than the long haul rates in which it participated with others, unless a case was

made out of dissimilar circumstances and conditions. Participating in the long haul rates, it was held, made them under the statute a maximum limit for short haul rates to be imposed on its own line, and made the short haul rates illegal when the limit was exceeded. But in that case there was no question of responsibility for the rates which were found to be illegal, nor could there have been, for they were made at pleasure by the local road. In this case the rates which defendant makes exclusively are not complained of; and as no one can be convicted of illegality in respect to action of others which he could not control, it obviously becomes necessary, before defendant can be charged in this proceedings, to show that at least it had the power to make the through rates different. But all the showing made is to the contrary.

The conclusion is that a violation of law by the defendant in the particular charged is not made out.

A further difficulty with complainants' case is that its purpose is to compel a change of the through rate from Frankfort to New York. But when it is shown that defendant, instead of controlling the whole line to the seaboard on which freight is transported from Frankfort, controls only the small fragment thereof from Frankfort to South Watah, it then becomes impossible, on any view that may be taken of the law of the case, to give, in a proceeding to which the defendant is alone made a party, the relief which the complainants seek. An order requiring defendant to cease charging more on Frankfort than on Indianapolis shipments to the seaboard would be quite futile. It could not be enforced against any carriers which are not parties to the proceeding, and the defendant would not violate it if, when called upon to give the rates, it gave those on its own line only. If in giving its own rates it did not antagonize the long and short clause of the statute, it would be guilty of no violation of law under the fourth section, which is the section on which this complaint proceeds.

When complainants desire to test the justice or legality of the through rates from Frankfort to New York, the necessity of bringing in the parties who make the rates, not for forty-

six miles merely but for the whole distance, is obvious. They must be brought in, first, because they have a right to be heard, and, second, because an order made and purporting to control their action when they were not parties would be improper on its face and in a legal sense ineffectual. If such an order could have any effect as against the initial road, it would only be to prevent its agents naming to shippers when they called for it an aggregate through rate ; it would not prevent its making the same rate as now to South Wanatah, nor preclude the connecting road from making rates independently from South Wanatah eastward.

On this finding an order will be entered that the complaint is not sustained.

NOTE.

According to the evidence the compensation of defendant for transporting one ton of grain from Indianapolis to Michigan City in connection with the Michigan Central is.....	67.0
Proportion to South Wanatah.....	53.6
Compensation per ton from Frankfort to South Wanatah in connection with the New York, Chicago and St. Louis.....	41.6

W. U. SMITH *v.* NORTHERN PACIFIC RAILROAD COMPANY.

Tried at Minneapolis Sept. 14—Decided Oct. 31, 1887.

The sale of " Land Explorer's Tickets " and " Settler's Tickets " at less than the regular rates charged to passengers at the usual ticket offices, as practiced by the Northern Pacific Railroad Company, is unjust discrimination.

Discrimination in rates charged passengers who enjoy the same accommodations is not justified by proof that the carrier's present or future business will be thereby stimulated, or that the settlement of the country will be promoted, or that those receiving the more favorable rates are persons of small means who are about to locate permanently in the Northwest.

The rule under which passenger transportation should be conducted requires

absolute equality of payment from all persons enjoying the same accommodations.

There is no illegality, however, in the company selling tickets with an agreement attached that in case the purchaser shall buy lands from the company, a part of the price of a ticket, or the whole of it, shall be allowed as payment of so much upon the land purchase.

Where one makes complaint under the Act to Regulate Commerce, and sets up a personal grievance which he fails to prove, the Commission may nevertheless, if a violation of law by the defendant appears, retain the case and take the necessary steps to bring such violation of law to an end.

Alfred S. Hall, for complainant.

James McNaught, for defendant.

REPORT AND OPINION OF THE COMMISSION.

WALKER, *Commissioner* :

The complaint alleges that the defendant is accustomed to sell tickets to "land explorers and settlers" at a rate much less than its schedule rate to the general public; and that the petitioner, not being a land explorer or settler, applied for a ticket at said lower rate, which was refused him. The answer attempts to justify the sale of such tickets at reduced rates to persons desiring to explore and settle upon the lands embraced in defendant's governmental land grants, and denies all knowledge or information of the complainant's alleged application for a ticket.

There being no proof before the Commission that the complainant was in fact refused an explorer's or settler's ticket on application therefor, or was refused transportation at the rates at which such tickets were sold, it is obvious that no personal grievance of the complainant is established. So far as his interests are concerned, there are no facts before the Commission upon which action can be taken.

Section 15 of the Act to Regulate Commerce provides, however, that if, in any case in which an investigation shall be made by the said Commission, it shall be made to appear to the satisfaction of the Commission, either by testimony of witnesses or other evidence, that anything has been done, or omitted to be done, in violation of the provisions of said act, by any common carrier, it shall be the duty of the Commis-

sion to take proper proceedings to put an end to such violation of law. The answer filed by defendant admitted and attempted to justify a course of dealing which the Commission regards as in certain respects illegal, and a report thereon is made a statutory duty. The defendant was heard by its officers at Minneapolis on September 14, and briefs have since been filed by both parties.

The facts found are as follows: The Northern Pacific Railroad Company owns and operates a railroad extending from Ashland, in the State of Wisconsin, and from St. Paul, in the State of Minnesota, westerly through the States of Wisconsin and Minnesota, and the Territories of Dakota, Montana, Idaho and Washington, to Tacoma, in the latter Territory. In connection with its charter this company received from the General Government extensive land grants in each of the said States and Territories, and it is continually engaged in offering said lands to purchasers and in making sales of the same. It has established various land offices, and has a land commissioner at St. Paul in charge of such sales. The sale of said lands is of great importance to the company, not only on account of the income arising therefrom, but also for the reason that the settlement and development of the country along its line tends to permanently increase the business of the road, and to insure its future prosperity.

The defendant company issues first and second class tickets, including first-class round-trip tickets, which are advertised upon its published schedules, and are sold at its usual ticket offices; together with such excursion and mileage tickets as are from time to time announced and sold to the public generally.

Besides these regular tickets it issues two special classes of tickets, called respectively, "Round Trip Land Exploring Rebate Tickets," and "Settler's One Way Land Tickets," which are used to induce possible purchasers to go and inspect said lands, and to buy and settle upon the same. Purchasers of these tickets are carried upon the regular trains of the company, and in the same cars with purchasers of the company's regular issues of tickets.

The above-described special tickets are not found at the

ticket offices, but can only be procured upon personal application to said land commissioner at St. Paul. They are issued at his discretion and are intended to be sold only to "*bona fide* land-seekers, examining with a view of securing lands, and to actual settlers." The rates are very low as compared with the regular first and second-class tariffs; for example: to Medora, in Dakota Territory, the first-class fare is \$23.50, second class \$19.35; explorer's round trip ticket out and back \$26.90, settler's ticket \$14.30; to Jamestown, first-class round trip out and back, \$21.10, explorer's round trip ticket \$11.00, etc.

In addition to these greatly reduced rates, the "Explorer's Ticket" bears a rebate coupon to be retained by the passenger, agreeing that in case he shall within forty days purchase not less than one hundred and sixty acres of the company's land, he will be allowed one-half of the amount paid for such ticket to be applied upon his first payment for the land; and the "Settler's Ticket" bears a like coupon entitling the passenger to an allowance on his first payment for lands purchased from the company, equal to the whole amount paid by him for such ticket. "Explorers Tickets" are sold to persons who represent themselves as intending to go out and inspect defendant's lands, with a view to subsequent purchase after returning to St. Paul, and are not transferable. "Settlers' Tickets" are sold to actual settlers upon the company's lands or upon the public lands, no rebates being available, of course, in the latter case. To secure settlers' one-way fares, passengers must be accompanied with emigrant effects. Only a portion of the company's road can be reached upon these special tickets, namely, from Milnor, in Minnesota, 305 miles from St. Paul, to Little Missouri, in Dakota, 626 miles from St. Paul. Explorers desiring to go further west than this are accommodated by special excursion rates open to the public and regularly advertised, made to points west of the Missouri river during the fall season of the year.

No objection has occurred to the Commission in respect to the plan pursued by the defendant in issuing these special tickets whereby an allowance is made, in the one case of one-half and in the other case of the entire price of the ticket,

to purchasers of the company's lands. The company may sell its lands at such price as it may see fit to establish therefor, and may accept whatever it sees fit in payment; and when it makes a discount from the selling price of an amount equal to the whole or to any part of the fare paid by the purchaser in inspecting or emigrating to said lands, it does not appear to violate any of the provisions of the Act to Regulate Commerce.

But when the defendant puts on sale in an emigration office, special tickets at reduced rates, which are not open to the public at large, but which are used by passengers upon its ordinary trains, justification for which is claimed in the fact that they are a valuable auxiliary to the company's sales of real estate, it certainly demands and receives from its ordinary passengers more for the same service, than it collects from persons who, truthfully or otherwise, represent themselves to be prospective purchasers of land or settlers. This course of dealing is in direct contravention of the second section of the Act to Regulate Commerce. The fact that the custom tends to stimulate the sales of the company's land or its future business, cannot be regarded as an excuse for its continuance. Many companies would very likely be glad to stimulate their freight business by offering special rates or even free transportation to shippers or to travelling salesmen; and other companies which are engaged incidentally in the sale of coal or any other outside enterprise, could largely increase their revenues by judiciously employing the facilities of transportation at their disposal; but all these methods are in direct opposition to the spirit and letter of the Act to Regulate Commerce, and are illustrations of the evils which the act was designed to remedy. In the transportation of passengers, carriers are performing a public duty under franchises granted by the State, and are subject to the rules of law which require absolute impartiality to all, when the circumstances and conditions are substantially similar. The fact that their own interests may be promoted to some extent by swerving from this rule, cannot be regarded as sufficient to warrant a departure from the obvious language of the statute.

It is further suggested that the "settlement of the country" should be encouraged; that the interest of the community is promoted by the taking up and settling of new lands in the Far West, and the development of the wonderful capabilities of the Territories across which defendant's line extends. This consideration, if entitled to weight, should be addressed to the legislative department. The law, as framed by Congress, admits of no exception upon any such ground; and in any event it may fairly be questionable whether the inducements which may properly be given to purchasers of railroad lands by way of discounts in settlement for the price thereof, and by way of excursion tickets open to the public at large, and apparently regarded as adequate in respect to defendant's territory west of the Missouri river, are not sufficient to bring their lands upon the market as rapidly as the interest of the country fairly requires.

It is further urged by the defendant that the transportation of that class of the public which it denominates as "settlers" is performed under different circumstances and conditions from those attending the transportation of the residue of the public. The reasons given are found in the facts that settlers are usually persons of small means who are about to locate permanently in the sparsely populated regions of the northwest; and that the settlement of that territory will yield a largely increased revenue to the defendant in the future, on both its freight and passenger traffic, so that it is greatly for the interest of the defendant to stimulate the movement of settlers toward the territories contiguous to its line. This is merely stating the same proposition in another form. A car-load of passengers leaving St. Paul, some of whom are tourists, some business men, some insurance agents, some settlers, are all in fact transported under precisely the same "circumstances and conditions" until they respectively leave the car, whatever may be their calling, or their intention as to future residence. It is not claimed that the rates in question are forced upon the defendant by competition, or by any external conditions whatever. They are made or refused at defendant's pleasure. The circumstances and conditions referred to by defendant's counsel do not pertain to the trans-

portation of the passengers, but are connected with their varying pecuniary ability and their possible future home. These considerations are not proper to be admitted in considering the propriety of discrimination between passengers who are patrons of common carriers.

Moreover "settlers," so called, are not confined to the great Northwest, but are found throughout the entire United States ; upon almost every passenger train a constant movement of population is going on between the States, which if once recognized as forming a ground for a discrimination in railroad charges, would make an opening extremely difficult to regulate. Professional and business men are frequently "settlers" in fact. Travellers coming through from Eastern points, who have purchased tickets to their ultimate destination, may not be informed of the opportunity to obtain a special rate at the St. Paul land office ; the same train may, and no doubt often does, contain "settlers," some of whom are charged much more than others. And again it is quite possible for the defendant to be imposed upon by persons who claim to be explorers or settlers, when in fact their actual intention is very different. These considerations illustrate the practical impossibility as well as the inevitable unfairness of attempts to discriminate among passengers by reason of any special classification founded upon means, occupation, or purpose.

It will be very difficult to find any principle upon which the transportation of passengers in our country can be impartially and fairly carried on short of maintaining the rule of absolute equality of payment from all persons enjoying the same accommodations.

The defendant must therefore be notified to immediately cease and desist from selling either of said special classes of tickets at lower rates than those established by it for the sale of tickets to the public generally.

**THE BOARDS-OF-TRADE UNION OF FARMINGTON,
NORTHFIELD, FARIBAULT AND OWATONNA v.
THE CHICAGO, MILWAUKEE AND ST. PAUL
RAILWAY COMPANY.**

Heard September 14.—Decided November 1, 1887.

Rates must not only be reasonable in themselves, but they should be so relatively reasonable as to protect communities and business against unjust discrimination.

When the same carrier operates parallel lines, and for any cause accepts low rates on one of them, it should provide sufficient corresponding advantages to the patrons of the other line to preserve the substantial equality contemplated by the statute.

Low charges upon one of two routes operated by the same carrier should not be made up by relatively high charges upon the other, when the result disastrously affects the business of communities situated upon the latter line.

SCHOONMAKER, Commissioner :

The complaint in this case sets forth that the charges made by the defendant Railroad Company for services rendered in the transportation of wheat, flour, and mill stuffs, from the towns of Farmington, Northfield, Dundas, Faribault, and Owatonna, in the State of Minnesota to points on the defendant's road in the States of Iowa, Wisconsin and Illinois, are unjust and unreasonable ; and also that the defendant company, contrary to the Act of Congress, charges and collects from persons living and doing business at Farmington, Northfield, Dundas, Faribault and Owatonna, a greater compensation for services rendered in the transportation of wheat, flour, and mill stuffs, to points on its road in the States of Wisconsin, Iowa and Illinois, than it charges and collects from persons living and doing business at St. Paul, Minneapolis, Stillwater, Menomonee, Eau Clair and Chippewa Falls, for a like and contemporaneous service in the transportation to the same points of a like kind of traffic, under substantially similar circumstances and conditions, thus subjecting the complainants to undue and unreasonable prejudice and disadvantage.

The facts found in this case are as follows :

The complainants are engaged in the milling business.

and have flouring mills at the places named in the petition. Their main supplies are procured from Western Minnesota and from Dakota ; but they also purchase and grind wheat produced locally in the vicinity of their mills, and in case of the failure of the local supply they purchase what additional wheat they need in the Minneapolis market.

The Chicago, Milwaukee & St. Paul Railway Company controls and operates an extensive railway system, extending westerly, by two different lines, to Iowa, Nebraska, Minnesota, and Dakota, and leading to Chicago as the eastern terminus. One portion of the system, which is in question in this case, is operated from the vicinity of Aberdeen, in Dakota, to Minneapolis and St. Paul ; thence, by two routes, to Milwaukee, and thence, on the same tracks, to Chicago. The more direct route from Minneapolis and St. Paul runs on the west side of the Mississippi river, in Minnesota, through Hastings, Red Wing, Wabasha, and La Crescent to La Crosse, in Wisconsin, to which point it is known as the River Division ; and from La Crosse, through Portage, to Milwaukee, which is known as the La Crosse Division ; and thence to Chicago, known as the Chicago Division.

The other route from Minneapolis and St. Paul diverges to the west and south until it reaches Milwaukee, and extends through Farmington, Northfield, Dundas, Faribault, Owatonna and Austin, in Minnesota, and Calmar, in Iowa, to McGregor, in the same State, known to that point as the Iowa and Minnesota Division ; from McGregor through Prairie du Chien and Madison to Milwaukee, and thence on the same tracks as the first route to Chicago, being known as the Prairie du Chien and Chicago Divisions.

Both branches are under the same management, and for a distance of eighty-five miles from Milwaukee to Chicago constitute one line of road.

The defendant also owns and operates as parts of its general system, lines of road from Stillwater to Hastings, and from Northfield to Red Wing, all in Minnesota ; also a line from Menomonee, Wisconsin, to Wabasha, Minnesota ; another from Chippewa Falls, Wisconsin, to Wabasha ; and a line from La Crescent on the River Division of the direct route

from St. Paul, through McGregor, Iowa, to Sabula, Iowa, and from thence through Savanna and Davis Junction to Chicago.

The distance from Minneapolis to Chicago, via Red Wing and La Crosse is four hundred and twenty miles; via Faribault and Prairie du Chien, four hundred and ninety-six miles; via Faribault and Sabula, four hundred and fifty-eight miles; via Red Wing and Sabula, four hundred and forty-one miles. Farmington, Northfield, Faribault, and Owatonna can reach Chicago by three different routes over defendant's road, one via Red Wing and La Crosse; another via McGregor and Prairie du Chien; and a third via McGregor and Sabula, the distances varying only slightly. The route by way of Prairie du Chien is a few miles in excess of the direct route from Minneapolis, and the other two a little less than that route.

The original points of shipment of wheat by defendant are mainly localities in Western Minnesota and in Dakota Territory, and it is billed to Milwaukee or Chicago by a method known as the milling-in-transit system, by which the through rate is paid at the place of shipment, with the privilege of converting it into flour *en route*, and then sending forward the flour, without further charge, to the point of destination.

In addition to the transit wheat thus transported, considerable quantities of wheat are consigned to Minneapolis and delivered there by other roads, and milled, or sold and shipped to other points. This is called free wheat, to distinguish it from the transit wheat.

The transportation rate charged by the defendant on through shipments of wheat from Dakota and Western Minnesota to Milwaukee and Chicago, with the privilege of milling in transit at Minneapolis and other points on the River Division of its road (and also at Farmington, Northfield, Faribault, Dundas, and Owatonna on the Iowa and Minnesota Division), is twenty-five cents per hundred pounds. This rate is divided into a charge of seventeen and a half cents per hundred from the points of original shipment to Minneapolis and St. Paul and seven and a half cents per

hundred from Minneapolis and St. Paul and from all points south of those cities on the River Division to Milwaukee and Chicago.

Free wheat and flour and mill stuffs transported from Minneapolis and St. Paul by the River Division to Chicago or Milwaukee are charged seven and a half cents per hundred, being the proportion of the through, or milling-in-transit rate from Dakota to the same destinations.

The rates charged by defendants for transporting wheat, flour, and mill stuffs from April 5, 1887, to May 26, 1887, from all the petitioning towns, to Milwaukee and Chicago was eighteen cents per hundred pounds. On May 26th, the rates were reduced from Faribault to fifteen and a half cents per hundred, and from Farmington to thirteen and a half cents per hundred. On June 1, 1887, the rates were reduced from Northfield, Faribault, Dundas, and Owatonna to fifteen cents, and were left at thirteen and a half cents per hundred from Farmington, at which sums they have since been maintained. The rate from Minneapolis to Milwaukee and Chicago, over the line through the petitioning towns, is also fifteen cents per hundred. Prior to and until April 5, 1887, a milling-in-transit rate of nine and a half cents per hundred was given the petitioning towns from Minneapolis to Milwaukee and Chicago.

The tariff rates for other freight from Minneapolis to Chicago are the same over both routes.

On these facts the petitioners claim that they are discriminated against and suffer undue prejudice and disadvantage. They urge that they are required to pay fifteen cents per hundred on the Iowa and Minnesota Division of, defendant's road for the transportation of the same kind of property that is charged only seven and a half cents per hundred on the River Division of the defendant's road, and that their business suffers seriously in consequence.

They concede that some difference in the rates on the two Divisions may reasonably exist under the conditions affecting traffic on the River Division, and on account of the longer distance to Milwaukee and Chicago by the other

Division, but claim that a rate one-third higher, or ten cents per hundred, should be the extent of the difference, and is all that the business will bear.

The defendant insists that the rates from the petitioning towns are reasonable and are in fact a large reduction on former rates; and that the seven-and-a-half-cent rate from Minneapolis by the River Division is too low, but is forced upon the railroad company by the competition of other lines of road running to Chicago, and by lines running from Minneapolis and St. Paul to Duluth for shipment by way of the Lakes to Buffalo, which latter roads charge only five cents per hundred from Minneapolis to Duluth. The rates from Duluth to eastern points being only two and a half cents a hundred higher than from Milwaukee and Chicago to the same eastern points, the defendant contends it has no option except to conform to the Duluth rates or abandon the business.

The alleged conditions of competition that exercise controlling influence on the rates for wheat transportation over defendant's lines from Minneapolis doubtless exist. They are not dependent upon the volition or action of the defendant. The defendant has yielded to their force in establishing its wheat rate upon its River Division, and all the towns upon that Division enjoy the low rate that the defendant is willing to give from Minneapolis. Upon the Iowa and Minnesota Division, however, which is coterminous at Minneapolis and Milwaukee with the River Division, a similar rate is refused, and a rate double in amount is charged for the same kind of traffic. This Division is apparently regarded as a separate and independent line, and for that reason at liberty to charge rates deemed suitable for the traffic without reference to the rates on the River Division, or to their effect upon business along the respective routes. This principle is not admissible. The carrier by both routes is the same. The rates for other traffic besides wheat are alike upon both divisions. The same reasons that give equality of rates to other traffic upon the two routes apply with equal, if not greater, force to the article of wheat. Although the low rate on the River Division may result from circumstances apparently beyond the

control of the carrier, and may be necessary to enable the carrier to participate in the business, yet, being willing to carry for that rate, the carrier should not, by a relatively unjust rate on the other division, impose a burden that renders business in wheat and flour practically impossible along that Division.

A bare statement of the existing disparity demonstrates its indefensible injustice. A Minneapolis or St. Paul miller purchasing free wheat in those cities which has paid a rate of seventeen and a half cents a hundred, ships its products to Milwaukee or Chicago at seven and a half cents a hundred. A miller in the complaining towns purchasing free wheat in the same cities or local wheat is required to pay fifteen cents a hundred to reach the same destinations with its products. The capacity of one of the mills in Dundas is six hundred barrels a day. It is computed by complainant's counsel that if its proprietor should purchase wheat in his own vicinity to operate his mill for a year, or should purchase it at Minneapolis, it would cost him to deliver his flour at Chicago \$28,170 more than the cost to a Minneapolis miller for the same quantity of wheat ground and flour shipped over the favored line. That would probably exceed the profits of the business, and the loss would fall upon the producer of the local wheat and the miller.

In a State where the wheat product is so large as in Minnesota, and the chief agricultural staple, inequalities of rates that affect industries so materially are of vital importance.

If the different rates on the two routes worked no hardship or injustice to any one, there would be no occasion for corrective remedies, but when, as the fact was shown in this case, the producers and millers located in the petitioning towns and along that division are seriously injured, and their business disastrously affected by the double flat rates charged them, the public interests are concerned, and a case is presented demanding redress. These rates obviously preclude competition with the Minneapolis and St. Paul mills and those on the River Division.

The two branches of the defendant's road from Minneapolis to Milwaukee, the one through Hastings, Red Wing and

La Crosse, and the other through the petitioning towns, cannot, on the facts of this case, be deemed the same line within the meaning of the fourth section of the statute. But both branches belong to and are operated by the defendant, and are under the same management, and trains may be run from Minneapolis over either branch.

While the inhibition of the fourth section of the statute against charging more for a shorter than for a longer distance over the same line does not literally apply, the defendant under the circumstances of the case is required to make its rates reasonable on both branches of its road. If the two lines were separately owned and operated, competition might substantially equalize the rates. And the fact that one company controls parallel lines affords no warrant for giving superior advantages to the patrons of one line and denying similar advantages to those of the other line. It may not be essential that the rates on the two lines should be identical. Some difference on account of greater distance and increased operating expenses and the conditions affecting the traffic may be reasonably permissible. Nor is it enough that, independently considered as if the parallel line did not exist, the higher rates might be deemed reasonable. They should be relatively reasonable, in view of their relations to each other and their effect upon the public in order to prevent undue and unreasonable prejudice and disadvantage, and thus in their results become unjust and unreasonable. Under the present rates the apparently low charges on the route embracing the River and La Crosse Divisions are reimbursed to the carrier by the relatively high charges on the route containing the I. and M. Division. This is unequal and unjust. The Act to Regulate Commerce is intended for the protection of the general public, and its prevailing principle is equality for all persons and communities under substantially similar circumstances and conditions. This demands such adjustments of rates as shall not discriminate unduly in favor of the business of some localities, and prove destructive to similar pursuits in other localities; and prohibits carriers from imposing excessive rates where the absence of competition affords opportunity to do so, and thus unfairly stimulate

avored communities at the expense of others. The larger cities and commercial centres usually enjoy valuable advantages because the interests of carriers and the existence of competition sufficiently guard them. But one object of the law is that the strong shall not have undue advantages over the weak, and that minorities shall be protected and their interests guarded so that substantial equality may exist for all.

It is claimed by the petitioners and is not effectively denied by the defendant, that while the present rate of seven and a half cents a hundred by the River and La Crosse branch of defendant's road is charged a rate of ten cents a hundred pounds from the petitioning towns to Milwaukee and Chicago, and a like rate from Minneapolis through those towns and over that Division of defendant's road would be a relatively reasonable charge, and the Commission so finds.

It is deemed proper to observe, to prevent any erroneous inference, that no opinion is intended to be expressed with reference to the system of charges known as the milling-in-transit rates; they are only referred to in this report as an existing method of transportation. The question of the legality or propriety of that system was not litigated in this case, and is not presented for decision.

The order of the Commission, on the facts of this case, is that the Chicago, Milwaukee and St. Paul Railway Company must equalize its rates for the transportation of wheat, flour and mill stuffs upon the two routes or branches of its road from Minneapolis and St. Paul to Milwaukee and Chicago, with a reasonable differential for the longer route, and recognizing the circumstances and conditions relating to the traffic on the shorter route; and that while a rate of seven and a half cents per hundred from Minneapolis and other points on the River and La Crosse Division to Milwaukee and Chicago and other points in Iowa and Illinois is charged, the rates from the petitioning towns for the like kinds of property and from Minneapolis over that Division of defendant's road to the same destinations, must not exceed ten cents per hundred, or a difference of one-third the amount of the lesser charge.

IN RE PROCEDURE IN CASES AT ISSUE.

Proceedings to be in the simplest form consistent with reasonable certainty.

No replication required. When facts are not agreed upon, depositions may be taken on notice, and the work should be entered upon immediately after answer. Assignments for hearing made on request of either party. Parties will be heard orally, or upon briefs, as they prefer.

The following letter, which was addressed to an attorney who made inquiry concerning the method of procedure in a case where an answer had been filed raising issues of fact, contains a statement of the practice then adopted and since pursued by the Commission.

WASHINGTON, D. C., June 15, 1887.

James Tillinghast, Esq., Attorney at Law, 12 South Main St., Providence, R. I.

DEAR SIR:—Yours of June 14th received. The rules of the Commission do not require a replication. It is intended that all its proceedings shall be in the simplest form consistent with a reasonable degree of certainty. Cases are considered as at issue, when the answer is filed and copies served. If issues of fact are raised upon the answer by denials, or by allegations of new matter, it is the understanding of the Commission that the case stands for trial upon the questions of fact as well as of law; a day for hearing will be assigned on request of either party; witnesses can then be examined, if necessary, and arguments made upon the law as applicable to the facts established by proof. The case can be presented by written or printed arguments if parties prefer to take that course. It is the desire of the Commission that parties agree upon facts relating to questions presented, so far as possible; and for this purpose, stipulations in writing may be filed or oral concessions made on the hearing. In case parties cannot agree upon the facts and desire to avoid the expense of bringing witnesses to Washington, depositions for use before the Commission may be taken on notice to the other side, in the manner provided by Sections 863 and 864 of the Revised Statutes of the United States. Such depositions when taken should be transmitted to the Secretary of the Commission, who will

open and file the same. If the taking of depositions is deemed necessary, it should be entered upon as soon as practicable after the service of the answer.

For the Commission : Yours truly,

EDWARD A. MOSELEY, Secretary.

IN RE PROCEEDURE CONCERNING QUESTIONS
OF LAW.

Dilatory proceedings considered objectionable, and a single speedy hearing desired in every case ; all proper questions will then be entertained, whether jurisdictional or relating to the merits of the controversy.

On July 13th, 1887, John S. Blair, Esq., of counsel for defendant in a pending case, appeared before the Commission and moved to dismiss the complaint, upon the ground that the matters alleged did not present a violation of the provisions of the Act to Regulate Commerce. No notice had been given of the motion.

The Commission declined to take up the motion.

First, because notice to the complainants had not been given.

Second, because the object of the motion was to reach the merits of the case and have them discussed and passed upon summarily instead of at the customary final hearing. A practice thus to anticipate by motion the final hearing the Commission did not think advisable, and would not, therefore, favor.

It was said that it is the desire of the Commission that the practice and proceedings in all cases shall be in the simplest form possible, consistent with justice, and that without dilatory motions, pleas in abatement or other interlocutory proceedings the matter in question be brought to an issue at the earliest practicable day, when a final hearing may be had ; all proper questions will then be entertained, whether jurisdictional or going to the merits of the controversy.

The case was afterwards heard and decided in the manner suggested. (See *Associated Grocers of St. Louis v. Missouri Pacific Railway Company*, page 156 *ante*.)

IN RE JOINT TARIFFS AND SCHEDULES.

Schedules of joint tariffs required to be filed with the Commission, by section 6 of the Act, need not be duplicated by each company which unites in making them. On receipt of a written statement from each corporation acknowledging the authority of the association, committee, or other traffic combination, to issue tariffs in its behalf, schedules filed by such association, etc., will be credited to each road in the organization which so requests.

The following letters, which were addressed to various parties, inquiring in respect to the filing of joint tariffs, etc., under section 6 of the Act to Regulate Commerce, express the desire of the Commission respecting the method to be pursued in the filing of schedules of passenger rates and joint tariffs of freight charges in which several carriers participate.

WASHINGTON, May 21, 1887.

L. J. Seargent, Esq., Traffic Manager Grand Trunk Railway of Canada, Montreal, Quebec.

DEAR SIR:—In reply to yours of the 18th inst., inquiring whether more than one member of a traffic combination, consisting of several railroads or freight lines, must file in this office copies of their agreements, joint tariffs, &c., I am authorized to state that, provided due notice from different companies is filed here that any one member or an agent is authorized to make return for all or several of the members of such combination, such filing will be sufficient for all the parties to the joint agreements, tariffs, and classifications, who may give such notice.

I am, very respectfully, yours,

EDWARD A. MOSELEY, Secretary.

WASHINGTON, D. C., June 15, 1887.

N. E. Weeks, Esq., Secretary Boston Passenger Committee, Boston, Mass.

SIR:—In the case of schedules of passenger rates issued by a committee representing a group of roads, the Commission desires a written statement from each corporation, to the effect that it is a member of the Association which the com-

mittee represents, and that tariff schedules filed by the committee are to be treated as if filed by such corporation. In case there is a written agreement, under which the Association works, a copy thereof should also be filed. Upon receipt of the foregoing, as evidence of the authority of the committee, schedules of tariffs and documents issued relating to changes in passenger rates, etc., will be received by the Commission and credited to each road in the Association as if filed by such road respectively. A letter of transmittal stating contents should accompany each enclosure.

Yours truly,

EDWARD A. MOSELEY, Secretary.

WASHINGTON, D. C., June 22, 1887.

J. N. Faithorn, Esq., Chairman W. & N. W. Freight Bureau, Chicago, Ill.

DEAR SIR :—In the case of schedules of passenger rates, and of joint tariffs of freight charges, and of classifications, circulars and other matter, issued by a freight bureau, association, or other traffic combination, consisting of several carriers, or issued by a committee representing a group of roads, the Interstate Commerce Commission desires a written statement from each corporation, to the effect that it is a member of the association in question, and that schedules, tariffs, and classifications, circulars, and other printed matter issued by the committee, or its chairman, or other authorized official, and filed with the Commission are to be treated as if filed by such corporation itself. In case there is a written agreement under which the association works, a copy thereof should also be filed.

Upon the receipt of the foregoing as evidence of the authority of the bureau, association or committee, schedules, tariffs and other documents, issued by it, will be received by the Interstate Commerce Commission, and credited to each road in the organization, as if filed by such road respectively; and in such case it will not be necessary for each carrier to file such publications individually.

A letter of transmittal stating contents should accompany each enclosure.

Very respectfully,

For the Commission.

EDWARD A. MOSELEY,
Secretary.

THE MANUFACTURERS' AND JOBBERS' UNION OF
MANKATO v. THE MINNEAPOLIS AND ST. LOUIS
RAILWAY COMPANY AND OTHERS.

Tried at St. Paul September 16. Report filed November 21, 1887.

When, after trial, but before decision, the defendant concedes the relief sought, and reduces its tariff to the rates claimed by the petitioner, no order is made or opinion announced by the Commission; a report of the facts is made to complete the record of the case.

E. M. Pope, for complainant.

W. H. Truesdale, Vice-President M. & St. L. Ry. Co.,
for defendant.

BRAGG, *Commissioner* :

The complaint in this proceeding was made by the Manufacturers' and Jobbers' Union of Mankato, in the State of Minnesota, against the Minneapolis & St. Louis Railway Company, The Chicago, Rock Island & Pacific Railroad Company, The Burlington, Cedar Rapids & Northern Railway Company, and The Kankakee & Seneca Railroad Company. It alleges that the Minneapolis & St. Louis Railway Company is a corporation created, organized, and existing under the laws of the State of Minnesota, and as a railroad company was, at the time of the filing of the petition and for more than two years last past had been, doing business as a common carrier in the State of Minnesota and elsewhere. It avers that petitioner is an association of business men of the city of Mankato, in Minnesota, whose object is to promote the business interests of that city. It states that the Minneapolis & St. Louis Railway Company, in connection with the Chicago, Rock Island & Pacific Railroad Company, the Kankakee & Seneca Railroad Company, and the Bur-

lington, Cedar Rapids & Northern Railway Company, have established traffic arrangements for the transportation of passengers and freights for hire from the city of Chicago, in the State of Illinois, to the various stations on the line of the Minneapolis & St. Louis Railway, in the State of Minnesota, including the city of Red Wing, the city of Minneapolis, the village of Waterville, and the city of Mankato, in said last-named State. It states that the direct line of the Minneapolis & St. Louis Railway Company, operated within the State of Minnesota for such traffic, extends from Albert Lea northerly through Waterville to Minneapolis. It states that the Wisconsin, Minnesota & Pacific Railway is controlled and operated by the Minneapolis & St. Louis Railway Company under the said traffic arrangement, and extends from the city of Red Wing westward through said village of Waterville to the city of Mankato, running in a general direction at right angles with said railroad, extending from Albert Lea to Minneapolis, as aforesaid. It states that the rates of freight established and published and at the date of the filing of the petition enforced by the Minneapolis & St. Louis Railway under said traffic arrangement from Chicago to Minneapolis were as follows per hundred pounds :

Class.....	1	2	3	4	5	A	B	C	D	E
Rates in cents....	50	40	30	20	12½	17½	15	13	10	8

It states that the rates of freight established by the Minneapolis & St. Louis Railway Company from Chicago to Waterville were the same as were established by that company from Chicago to Minneapolis by reason of the operation of section 4 of the Interstate Commerce Law, the distance from Chicago to Waterville being sixty-five miles less than from Chicago to Minneapolis.

It states that the Minneapolis & St. Louis Railway Company has established and put in force a tariff on its line from Red Wing to Mankato, the rates of which from Chicago, through Waterville, to all points east of Waterville on said line, for a distance of sixty-seven miles to the city of Red Wing, were the same as established by said company to Waterville, while to all points on said line west of Waterville,

including the city of Mankato, a distance of twenty-nine miles, were unreasonably and unjustly in excess of said rates to said village of Waterville, and from Chicago were as follows per hundred pounds :

Class.....	1	2	3	4	5	A	B	C	D	E
Rates in cents. . .	60	50	35	25	17½	22½	18	16	13	10

It states that said rates from Chicago to points west of Waterville on said line, including said city of Mankato, were from twenty to forty per cent. in excess of the rates established and in force by said Minneapolis & St. Louis Railway Company from Chicago to said village of Waterville and points on said line east of Waterville to the city of Red Wing, although the distance is much less, and the city of Mankato is the most important shipping point on said line of railroad in the State of Minnesota, excepting St. Paul and Minneapolis.

The prayer of the petition is that the Minneapolis & St. Louis Railway Company shall be directed and required to so adjust its said tariffs on freights from the city of Chicago, in the State of Illinois, that its rates to the city of Mankato, in the State of Minnesota, and to all other points west of Waterville and between Waterville and Mankato, on said line of railroad, on all classes of freight shall hereafter be no higher than the rates established by said company from the city of Chicago to said village of Waterville and points east on said line of railroad between Waterville and the city of Red Wing and points north on said main line between Waterville and the city of Minneapolis.

At the hearing, which occurred in St. Paul, Minnesota, it was admitted by the defendants that the above facts, as set forth in the petition, were, in substance, true, but, while admitting this, the defendants did not admit that petitioner was entitled to the relief sought. On the contrary, they denied that petitioner was entitled to any relief whatever. They relied in their defense upon two grounds : First. That each of these rates were fair and reasonable in themselves. Second. That these rates between Waterville and Red Wing were caused by the competition of the water lines of Lake Superior,

in connection with rail lines operating from the lake points into the interior. And upon these grounds they insisted that in no sense was there any unjust discrimination or unlawful preference in any of these rates.

Several witnesses were examined before us by the respective parties at the hearing, and documentary evidence was also submitted on behalf of the petitioner. The matter was then submitted for our report and opinion. At a subsequent day, after we had fully considered the matters involved, but before the announcement of our report and opinion, we received notice that the respondent railway company had conceded the relief sought, and on the 20th day of October, 1887, had made and published a tariff of rates to take effect October 28, 1887, by which the rates are reduced and made the same at Mankato and points between Waterville and Mankato that the rates are at Waterville and at points between Waterville and Red Wing over the defendant's said lines on freights from Chicago to these points, as above set forth.

This disposes of this complaint, and under the circumstances we have only deemed it necessary to make the report of it here stated to complete the record of the case.

E. B. RAYMOND *v.* THE CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY.

Tried at Minneapolis September 13; decided November 21, 1887.

When the Act to regulate commerce took effect, the grain and flour rate to Chicago from Minneapolis, Red Wing and Lake City, on the main line of the Chicago, Milwaukee & St. Paul Railway, was 15 cents per hundred pounds, and from Mazeppa, a station on the narrow gauge branch line of said road, it was 17 cents per hundred pounds. These rates have been reduced to $7\frac{1}{2}$ and $12\frac{1}{2}$ cents. *Held* that, without other testimony than that afforded by a comparison between these rates, $12\frac{1}{2}$ cents from Mazeppa will not be declared unreasonable and unlawful under the first section of the Act to regulate commerce.

Rates and charges, not unreasonably high of themselves, can be so adjusted in their relations to each other as to give the undue preference and produce the unreasonable advantage which the third section of the Act to regulate commerce makes unlawful.

If a railway company, in establishing charges on different divisions and branches of its road, so adjusts them as to divert trade and business to one locality, which, naturally, under an equitable adjustment of charges, would go to another, such preference for one place and disadvantage to another is not excused or made lawful by the fact that some of such charges are not entirely voluntary, but result from competition between carriers.

E. B. Raymond, complainant in person, by written argument.

Burton Hanson, for defendant.

MORRISON, *Commissioner* :

It appears from the statement of E. B. Raymond, by way of complaint against the Chicago, Milwaukee & St. Paul Railway Company, that he is a resident of the town of Mazeppa, county of Wabasha, State of Minnesota, and interested there in buying and selling wheat and other farm products for shipment over the defendant's road to more eastern markets.

The defendant railway company owns and operates two lines of railroad through from Chicago, Illinois, by way of Milwaukee Wisconsin, to Minneapolis Minnesota, with branch lines or roads to and from various points on each of said through lines. Both through lines run over the same track from Chicago to Milwaukee. The through and the branch roads are divided into parts designated divisions.

By the most direct of said through lines of defendant's road, herein treated as the main line, the distance from Chicago to Minneapolis is four hundred and twenty miles. The part of this main line between La Crosse and Minneapolis, with stations at Wabasha, Lake City and Red Wing is the "River Division."

The branch line of defendant's road, sixty miles long from Wabasha on the main line to Zumbrota, with stations at Mazeppa and McCracken, is narrow gauge and is the "Wabasha Division."

From Wabasha, the junction of the "narrow-gauge" branch with the main line, the distance over the main line northwest to Lake City is twelve miles and to Red Wing twenty-nine miles. Over the branch line the distance west (from

Wabasha) to McCracken is eighteen and to Mazeppa fifty-two miles. The distance north from Mazeppa to Red Wing by wagon road is twenty-two miles and nearly the same to Lake city, and both are competitors with Mazeppa for the grain and other trade of the territory intervening. The distance to Chicago from Mazeppa is three hundred and ninety-two, from Red Wing three hundred and sixty-nine, from Lake City three hundred and fifty-two miles. To Milwaukee the distance is less than to Chicago by one hundred and seven miles.

From August 15, 1886, to April 5, 1887, when the Act to Regulate Commerce took effect, the published rate of defendant for carrying wheat and other grain to Chicago from Lake City, Red Wing, Minneapolis, and other points on the River Division of defendant's road was fifteen cents; on the Wabasha Division it was fifteen cents from McCracken and from Mazeppa seventeen cents on the hundred pounds. On April 5, 1887, this rate from Mazeppa to Chicago was increased to eighteen cents, the rate from Minneapolis, Red Wing and Lake City remaining at fifteen cents until May 18, 1887, when it was reduced to ten cents, the rate from McCracken then still remaining at fifteen cents per one hundred pounds. On this statement of facts, which is not contested by defendant, the complainant alleged that the discriminations made by the defendant against the locality of Mazeppa were unjust and sufficient to divert largely its grain business; that the excess of eight cents in the Mazeppa rates over Lake City and Red Wing rates was, and any difference or excess in such rates above two cents, would be an undue preference in favor of Lake City and Red Wing and an unreasonable prejudice against Mazeppa in respect of the grain and other trade in which complainant was, and is, interested.

On the 20th of May, 1887, when the defendant railway company had notice of complainant's petition for relief, the defendant reduced its rates to Chicago from Lake City, Red Wing and stations on the River Division of its road, including Minneapolis, to $7\frac{1}{2}$ cents. Six days later, May 26, 1887, it made a reduction in rates on the Wabasha Division, the

rates from Mazeppa to $12\frac{1}{2}$ cents, and from McCracken, distant 18 miles from the main line, to 8 cents per 100 pounds.

The defendant railway company, answering, admits many and contests none of the facts stated above, but asserts that the Mazeppa rates are, and have been since April 5th, 1887, reasonable and just, and avers that the lower rate, $7\frac{1}{2}$ cents, on the River Division is "exceedingly low and unprofitable," is not voluntary, but the result of competition, and only indirectly affects the rates at Mazeppa.

This answer of the defendant was supported by the testimony of witnesses tending to show that the Mazeppa rates of $12\frac{1}{2}$ cents are reasonable within themselves and without relation to the $7\frac{1}{2}$ -cent rates on the main line, and that by reason of competition defendant was, and is, compelled to accept the latter rates to get any share of the main line grain traffic.

This testimony, intelligent in theory, is based in part on comparison of these rates with rates for like distances in the States of Iowa and Illinois under State regulation, with no explanation of surrounding circumstances, and partly on the estimate of the cost of the service dependent upon conditions so numerous and variable as not to be convincing.

The only evidence before us in support of complainant's statement that the Mazeppa rate, now $12\frac{1}{2}$ cents, is unreasonable is afforded by comparison of this and other rates on the branch line with the Red Wing, Lake City and other rates on the River Division of the main line. It already appears that the rate complained of, now $12\frac{1}{2}$ cents, was 18 cents when the complaint was made. Before the Act to regulate commerce was passed it had been as high as 30 and never lower than 17 cents. We do not feel authorized to declare $12\frac{1}{2}$ cents an unreasonable charge for the service rendered, or that a rate nearly a third lower than it had ever been previous to the Act to regulate commerce, is unjust and unlawful of itself, or within the meaning of the first section of the said Act.

The averment of defendant's answer that $7\frac{1}{2}$ cents, the River Division grain rates, were, and are, exceedingly low and unprofitable is qualified by the statement of the defend-

ant's general manager that low as they are they yield something more than the cost of moving the grain. So qualified, the averment means only that if all freight was carried over defendant's road at rates no more profitable the earnings might not equal the cost of the service, including a reasonable return on the capital invested. Thus qualified, the averment is not without support in the facts presented.

The surplus products of Northwestern grainfields go largely to Eastern States for consumption or for export. Conceding that it may be true, as claimed by defendant's answer, that to share in the grain traffic from Minneapolis it must accept rates made by its competitors, and assuming that under the fourth section of the Act to regulate commerce the rates for the shorter distance from Lake City and Red Wing cannot be greater than the Minneapolis rate, and it can yet be true that these rates give an undue preference to these places as against Mazeppa in the grain and other "produce" trade.

Rates and charges not unreasonably high of themselves can be so adjusted in their relations to each other as to give the undue preference and produce the unreasonable disadvantage which the third section of the Act to regulate commerce makes unlawful; and if the defendant railway company in establishing its charges on the different divisions and branches of its road so adjusts them as to divert trade and business to one locality, which naturally, under an equitable adjustment of charges, would go to another, such unreasonable preference for one place and disadvantage to another are not excused or made lawful by the fact that some of such rates are not entirely voluntary, but the result of competition with other carriers.

The complaint does not insist that no advantage shall be given to competing towns on the main line, but that the advantage shall not be unreasonable, and so the law provides.

It is said in behalf of the defendant that the Wabasha Division being a narrow-gauge road, the volume of traffic small, and requiring transfer to the main line at Wabasha, 5 cents is not an unreasonable charge for the additional service resulting from these conditions. This reasoning loses some of

its force in connection with the fact that the rate from McCracken, on the Wabasha Division, is but 8 cents per 100 pounds, or one-half cent above the main line rate, for the haul to and transfer at Wabasha.

The traffic over the road being small its cost of movement is not believed to be greater than if the road were of the standard gauge.

The difference now complained of in the rates at Mazeppa compared with rates at Red Wing and Lake City is 5 cents per 100 pounds, a difference equal to two thirds of the rate of the last-named two places.

For eight months next before the Act to regulate commerce was in force this difference was but two cents, or less than one-seventh of the then rates from Lake City and Red Wing.

Any difference in the rates named so large as that now existing, 5 cents, cannot fail to so divert a part of the grain trade as to subject Mazeppa to unreasonable disadvantage and give undue preference to Red Wing and Lake City, its rivals in that business. This difference should neither exceed $2\frac{1}{2}$ cents on the 100 pounds nor one-third part of the rates made in the adjustment of charges from said competing towns. Such a difference or discrimination in the rate will compensate the defendant railway company for any additional cost of transportation from Mazeppa over the cost from the competing towns.

The complaint asks the Commission to cause to be refunded to shippers from Mazeppa over defendant's road any charges in excess of reasonable charges paid by them since the Act to regulate commerce took effect. The amount claimed to have been so paid, and the names of the persons paying the same, are not stated, nor is there evidence before us to authorize consideration of the subject.

In the argument both parties debated, in connection with, or as part of, this proceeding, the system of transportation known as "milling in transit;" also the fourth section, or long and short-haul clause of the Act to regulate commerce. Under the milling-in-transit system grain billed through is stopped on the way, ground into and forwarded as flour,

and the two shipments treated as one. The fourth section of said Act declares it unlawful to charge more "for a shorter than for a longer distance over the same line in the same direction, the shorter being included within the longer distance." The longer distance from Minneapolis to Chicago over the main line is 420 miles. It would seem to require some extension to include the shorter distance from Mazeppa to Chicago, 52 miles of which is on the narrow gauge branch line, and any experiment in running the same cars over all of the alleged same line of said railway company would most likely upset the cars, if not the argument of counsel.

These questions, first raised in the argument, are not presented in the complaint or answer. They are not before us for adjudication and no opinion is expressed as to them.

It is therefore ordered by the Commission that the Chicago, Milwaukee & St. Paul Railway Company so readjust its rates and charges to Milwaukee & Chicago from Mazeppa on the Wabasha Division and Lake City and Red Wing on the River Division of its road, that the difference in favor of the points named on the River Division shall neither exceed two and a half cents nor one-third part of its own rates, and while the rates and charges on flour, grain and other like products are seven and a half cents on the 100 pounds from Lake City and Red Wing to Milwaukee and Chicago the rates from Mazeppa to Milwaukee and Chicago shall not exceed ten cents on the 100 pounds on the like kind of property.

W. O. HARWELL, H. B. MONTGOMERY, AND J. W. PONDER, COMMITTEE ON TRANSPORTATION OF THE BOARD OF TRADE OF OPELIKA, ALABAMA, v. THE COLUMBUS AND WESTERN RAILROAD COMPANY AND THE WESTERN RAILWAY OF ALBAMA.

Heard October 19.—Decided December 3, 1887.

The mere fact that a point is situated upon a navigable stream, held not sufficient of itself to justify the lesser charge for a longer haul to such a point.

Competition by water, to be sufficient to justify an exception under section

4 of the Act, should be actual, of controlling force, and in respect to traffic important in amount.

Discrimination under section 2, and prejudice and advantage under section 3, when water competition is brought forward as a justification, require the same measure of proof.

Parties affected are entitled to be notified in case a change in rates is asked.

No order correcting the unjust discrimination now made, for want of proper parties and distinct allegations. Amendments allowed, and revision of tariffs recommended to defendants.

Through rates and through bills of lading given on other commodities, and to other points similarly situated, should be given to Opelika on cotton, no excuse being shown for refusing same.

WALKER, *Commissioner* :

Complaint under section 3 of the Act to regulate commerce for alleged unjust discrimination against Opelika in favor of Montgomery, Ala., and Columbus, Ga.

Answers were filed by both defendants. The answer of the Western Railway of Alabama, by Cecil Gabbett, General Manager, is quite full, in substance alleging that rates at Opelika are the result of considerable negotiation and compromise, and although less favorable than at Montgomery and Columbus are more favorable than at Cusseta, Youngsboro', Gold Hill, and other points in the immediate vicinity of Opelika, claiming "that there is more ground for complaint against the railroads for discriminating in favor of Opelika against Auburn, Cusseta, Youngsboro', and Gold Hill than there is for Opelika to complain of discrimination in favor of Montgomery and Columbus. The circumstances and conditions which cause the difference in the rates between Opelika and the cities of Montgomery and Columbus are more potent and forcible than any that could be shown in favor of Opelika as against its neighbouring towns."

The answer of the Columbus and Western Railroad Company, by E. P. Alexander, president, contains the following :

"Montgomery, situated on the Alabama river, and Columbus, situated on the Chattahoochee river, have lower rates than Opelika. The reason is very plain; the railroads there have water competition, and are compelled to meet it. The rates to Opelika are made by adding to the rates at

Montgomery or Columbus a line of rates we call the 'Ball Arbitraries,' as they were suggested by Colonel Ball, one of the State Railroad Commissioners of Alabama. They are less than the local rates which generally prevail on the railroads in that State.

"Opelika wishes them still further reduced. I am prepared to say that I am not unwilling to reduce them so far as Opelika is concerned, if I may be allowed to reduce them to Opelika without making the reduction general to all other stations upon the line of the Columbus and Western railroad."

The case was assigned for hearing by the Commission on October 19, 1887, at which time the complainants were present and were heard. The defendants were not present, but had admitted receipts of notice of assignment of the case for that date. The general subject of the rates at Opelika had been previously brought before the Commission at its session in Atlanta, Ga., on April 28, 1887, when Mr. Harwell, one of the present complainants, testified at considerable length and was cross-examined by Mr. Alexander. The latter gentleman also referred to the subject in the argument which he made before the Commission at that time as President of the Central Railroad Company of Georgia. The proceedings at Atlanta are referred to in the petition in the pending case. The Commission understand that the defendants are content to submit the controversy upon the proofs and arguments laid before the Commission at Atlanta and appearing in the record of the present proceedings.

The facts found are as follows: Opelika is a town of about 3,500 inhabitants, located in the eastern part of the State of Alabama, 109 miles from Atlanta and 66 miles from Montgomery. The road from Atlanta to Montgomery, through Opelika, is composed of the Atlanta and West Point Railroad and the Western Railway of Alabama, which connect at West Point, on the State line, and are operated as a continuous line from Atlanta to Montgomery by the same management. Columbus, Ga., is situated 29 miles southeast of Opelika, on the Columbus and Western railroad, which is a part of the Central Railroad of Georgia system, extending from Savan-

nagh westerly across Georgia into Alabama. The Columbus and Western railroad is prolonged through Opelika (where it crosses the Western Railway of Alabama) in a northwesterly direction towards Birmingham, being operated a distance of 60 miles to Goodwater. Another railroad, called the East Alabama Railway, extends directly north from Opelika, a distance of 22 miles, to Buffalo, in Alabama.

Opelika is surrounded by a territory producing cotton and consuming provisions and other products of the Western and Northern States. Columbus is surrounded by a similar territory and is upon the east bank of the Chattahoochee river, which at that point is the boundary between the States of Georgia and Alabama. This river is navigable except in the dry season of the year.

Montgomery, in the center of Alabama, is on the main line of the Louisville and Nashville Railroad, extending from Cincinnati to New Orleans. It is also reached by the Central Railroad of Georgia, via Eufaula, and by the Western Railway of Alabama, as above stated, extending through Montgomery to Selma on the west; it is also situated on a navigable stream. The rates from the Northern and Western States to Montgomery by the Louisville and Nashville, via Birmingham, and by the Western Railway of Alabama, via Atlanta, are the same; and are considerably less than the rates from the Northern and Western States to Opelika. The rates from the Northern and Western States to Columbus, by way of the Louisville and Nashville Railroad and Montgomery, and also by way of Atlanta, in both cases passing over the Western Railway of Alabama to Opelika, thence 29 miles over the Columbus and Western to Columbus, are also considerably less than the rates to Opelika. The Central Railroad of Georgia also has another more southerly route from Montgomery to Columbus, via Union Springs, on the Montgomery and Eufaula line. The Central Railroad Company of Georgia also controls the Western Railway of Alabama as part of its general system, so that the rates to both Opelika and Columbus are practically established by that company, of which Mr. Alexander is president; and at Montgomery by that company acting in harmony with the Louisville and Nashville Railroad Company.

For example, it appears that the rates from Cincinnati are as follows :

To—	1	2	3	4	5	6	A	B	C	D	E	H	F
Montgomery.....	108	102	88	71	59	47	32	33	32	28	52	57	56
Columbus.....	117	102	91	76	63	52	32	40	35	31	54	59	62
Opelika.....	150	120	107	90	75	62	40	28	43	37	66	82	90

Cusseta is a station on the Western Railway of Alabama eleven miles northeast of Opelika. A Montgomery jobber can purchase first class goods in Cincinnati, have them shipped to Montgomery for \$1.08, then back to Cusseta for 53 cents—total, \$1.61—passing through Opelika twice in so doing. An Opelika jobber would pay on the same goods 1.50 from Cincinnati to Opelika and 22 cents from Opelika back to Cusseta, making a total of \$1.72. Dadeville is a station on the Columbus and Western Extension thirty miles northwest from Opelika. A Columbus jobber can purchase first-class goods at Cincinnati, paying to Columbus \$1.17; thence to Dadeville, 66 cents; total, \$1.83, passing through Opelika in both directions. The Opelika jobber would pay on the same goods: Cincinnati to Opelika, \$1.50; Opelika to Dadeville, 59 cents; total, \$2.09. The rate on flour from St. Louis to Montgomery is 59 cents per barrel by way of Birmingham or by way of Atlanta, while the Opelika rate is 90 cents and the Columbus rate 76 cents. The rate from Montgomery to La Grange, Ga., through Opelika, is 64 cents, which, added to 59 cents, makes a charge of \$1.23 as the rate a Montgomery jobber can handle flour at La Grange. The rate from Opelika to La Grange is 42 cents, making \$1.32 as the rate the Opelika jobber can handle flour at La Grange, with 132 miles shorter haul. The present rate from New York to Opelika is \$1.65, first-class; to Montgomery, 66 miles further, through Opelika, \$1.00. The rate on cotton is 52 cents per hundred pounds from Opelika to Savannah, Ga.; from Montgomery and Columbus to Savannah the rate is 45 cents per hundred pounds. No through rate is stated and no through bills of lading are issued on cotton from Opelika to New Orleans. In order to ship cotton to New Orleans a local rate of 27 cents to Montgomery is charged, and the cotton has to be rebilled from that point.

The foregoing illustrations are examples of the rates made on every class of merchandise from and to all northern and western points and the seaboard. Upon the foregoing facts there seems to be no question but that the charge of discrimination against Opelika and in favor of Columbus and Montgomery is substantiated. Indeed, this is not denied by the defendants, who, however, claim that the discrimination is founded upon grounds which render it not unjust. The practical result in this case is the natural one, namely, that the Opelika merchants have been unable to successfully compete with the merchants of the rival towns in their efforts to make Opelika a distributing point. The value of real estate has largely decreased. The business of handling cotton for sales abroad has been diverted to other towns to a great extent, and the town, although the most important in population and location on the line between Atlanta and Montgomery, has not held its own in the progress of the last decade, but has been outstripped by its competitors and practically left behind.

The considerations upon which the defendants attempt to justify their treatment of this community involve broader questions than those presented by the present rates between two or three neighboring towns and cities. The question from the standpoint of the defendants cannot be considered without entering to some extent upon the method under which freight rates are made in the Southern States, as related to the requirements of the fourth section of the Act to regulate commerce. Their position amounts, in substance, to this: That they admit that the rates to Montgomery and Columbus are made less for the longer haul than to intermediate points on the same line of road, but that they are justified in so making them by reason of the water competition which exists at those points and which compels the establishment of very much lower rates than naturally would be made, while they claim that the rates to intermediate points are reasonable and just; but they say, in substance, that what the merchants of Opelika desire is the establishment in their favor of another competing point or "trade

center" at which the rates shall be materially lower than to intermediate points on the same line, thus inviting them to commit a still further breach of the letter of the fourth section without the justification of water competition, which exists in respect to the other places named. This they say they are not willing to do, insisting that Opelika cannot be properly treated otherwise than as a local station on the line of the Western Railway of Alabama; and, not having the advantages of water competition, cannot ask the railroads arbitrarily to give them such advantages as they would have if located upon a navigable stream.

Another complication is found in a circumstance referred to in Mr. Gabbett's answer, namely, that this controversy is one of long standing, which, in 1884, was made the subject of investigation by the State Railroad Commissioners of Alabama, who were of the opinion that the law under which they were acting required more liberal treatment of Opelika on the part of the roads. The arrangement which was then made was not satisfactory to Opelika, although a concession to some extent was instituted. It appears that a system of arbitrary figures, called the "Ball Arbitraries," was then established, whereby the Opelika rate was made by adding these arbitrary figures to the rates to Montgomery or Columbus, the result being that, although the Opelika rates were considerably higher than the rates at those points, nevertheless they were somewhat lower than the rates at the adjoining points in its vicinity. Thus, for example, the rates furnished the Commission by the Louisville and Nashville Railroad Company from Louisville, Kentucky, in effect from August 20th, 1887, show the following on flour per barrel:

To—			
Montgomery, Ala.,	52	cts.	
Columbus, Ga.,	58	"	
Eufaula, Ala.,	58	"	
Atlanta, Ga.,	54	"	
Opelika, Ala.,	72	"	
Auburn, "	90	"	Seven miles west of Opelika.
Salem, "	92	"	Ten miles southeast of Opelika, towards Col'mb's
Cusseta, "	91	"	Nine miles northeast of Opelika, towards Atlanta.
Dadeville "	110	"	Thirty miles northwest of Opelika, on the Col- umbus and Western Extension.
Buffalo, "	97	"	Twenty-two miles north of Opelika, on the East Alabama Railroad.

From these examples which illustrate the rates on every commodity to all points, similarly situated, it is apparent that while the rates to Opelika are considerably higher than the rates to Montgomery, Columbus, and Eufaula, they are nevertheless, considerably lower than the rates to the neighboring points in every direction. In other words, Opelika is now treated by the railroad companies to some extent as a competing point or trade center as against the surrounding towns, but does not receive this treatment to a sufficient extent to enable it to compete with other distributing points, or to satisfy the desires of its citizens; and while the railroad companies say that they cannot properly give Opelika further concessions in rates, by reason of the unfairness to the neighboring points which such concessions would involve, nevertheless they admit that they are making such concessions at the present time to a considerable extent. Mr. Alexander's answer is very explicit in its statement that he is not unwilling to reduce the Opelika rates, provided he may do so without making the reduction general to all other stations, while Mr. Gabbett's answer is equally explicit in showing that Opelika already enjoys large advantages over Gold Hill, Youngsboro', Auburn, Cusseta, and its neighboring towns generally.

That this result is the natural outcome of that system of rate-making which the Interstate commerce law found in force upon most of the railroads of the Southern States is admitted by Mr. Gabbett, who, in his answer, says, "Samples can be found all throughout the South similar to that of Opelika, where rival roads have not reduced the rates to an undesirable figure. None of such points can get freight from the West and sell to any station beyond them at as low an aggregate as Montgomery, Columbus, and Selma can; nor can the rates be constructed to allow this without making the rates to all railroad stations in the State the same, which would destroy the railroad property in this State."

It was in view of cases like the present that the opinion of the Commission, in deciding upon the application of the Louisville and Nashville Railroad Company for relief under

the fourth section of the Act, discussed the subject of trade centers" in the South, using, among other things, the following language: "The prevalence of such ideas and the acting upon them in making freight tariffs give to railroad managers a power of determining within certain limits what towns shall be trade centers and what their relative advantages; and while it may be, as they assert it is, that, in deciding upon rates under the pressure of the competition of trade centers, they endeavor to do justice between them, yet, as they do not at the same time feel a like pressure from non-competitive points, it is obvious that justice to such points is in great danger of being overlooked, and it is altogether likely that it is to some extent.

"One result is that towns recognized by railroad managers as trade centers come to be looked upon as towns with special advantages, and other towns strive for recognition as such, and complain, perhaps, of injustice when they fail."

The system of ratemaking in the Southern States, which was quite generally operative when the Act to regulate commerce took effect, and which is still employed upon the roads here in question, is this: Certain large cities and towns situated on the coast at interior river points and at railroad junctions are called competitive, and receive quite low rates on all interstate traffic; all other stations are called local, and are charged much higher rates. The rates to local points are made by adding to the competitive rate at the nearest competitive point the local rate from that point. These local rates are ascertained upon a short-distance mileage basis, frequently by using the table established or approved by State Railroad Commissioners. The intermediate or local stations are "given the benefit" of what is called the lowest combination—that is, if the rate to the competitive point, plus the local rate to the given point beyond, exceeds the rate to the next competitive point, plus the local rate back to the given point, the latter rate is taken.

Thus between every two competitive points the graphic representation of the rates upon paper would show a rise, increasing rapidly until the highest point is reached at some

station intermediate, and then descending as rapidly to the other end of the line. Under this system, the rates on first-class freight from Louisville to the various stations on the road between Atlanta and Montgomery are as follows (Louisville and Nashville Railroad Company Tariff, August 20, 1887; distance Louisville to Atlanta, 476 miles; Louisville to Montgomery, 490 miles):

Station.	Rate.	Distance from Atlanta. <i>Miles.</i>
Atlanta.....	\$1 07	
East Point.....	1 23	6
Fairburn.....	1 31	18
Palmetto.....	1 36	25
Newman.....	1 39	39
Grantville.....	1 47	51
Hogansville.....	1 47	58
La Grange.....	1 54	71
Gabbettville.....	1 54	80
West Point.....	1 58	87
Cusseta.....	1 51	98
Opelika.....	1 30	109
Auburn.....	1 45	116
Loachapoka.....	1 43	123
Notasulga.....	1 41	129
Chehaw.....	1 36	136
Cowles.....	1 30	145
Shorter's.....	1 26	152
Mount Meigs.....	1 20	161
Montgomery.....	98	175

It will be seen that the rates to points between Montgomery and Atlanta (except Opelika, which is treated exceptionally) are made by adding the local rates to the rate of one of said special points or "trade centers;" and that the rates are highest at La Grange and Gabbettville, about midway of the total distance, where they are 59 per cent. higher than at Montgomery. The evidence before us shows that business from Louisville for these local points is about as likely to go through Montgomery as through Atlanta. The rate either way is the same, and so of all other Northern and Western points. The disproportion of the charges made to the above enumerated local points in the last few miles of a 500-mile haul is obvious.

It is true that in this instance the freight is received at

Atlanta or at Montgomery by a new carrier, but the same system is applied in case a so-called competitive point is passed on the line of the same carrier.

In the distance tariff furnished by the Railroad Commission of Georgia the increase in the tariff on first-class freight between 400 and 420 miles is three cents, while the charge for a single haul of 20 miles is twenty cents; yet on freight from Cincinnati, Ohio, to East Point, the Atlanta and West Point Railroad Company adds to the Atlanta rate as much as it charges upon freight to East Point which originates in Atlanta, and so of all other stations on its line; and the Central Railroad Company of Georgia, in making a rate from Savannah to the West wholly on its own road—for instance, to Salem, Alabama—charges the established “competitive” rate to Columbus, 292 miles, and adds thereto the local rate for 19 miles, Columbus to Salem; thus, on fertilizers, per ton, \$3.00 plus \$1.40 = \$4.40, Savannah to Salem; being \$3.00 for 292 miles, to which is added \$1.40 for the last 19 miles of the haul, making \$4.40 total rate.

Under the use of this system the railroads have to a very large extent absorbed the business which in the past was done by steamboats at competitive points, and this is true at Columbus, one of the points in question, as to which it is said in the answer “the water competition on Western products by steamboats has practically ceased during the past three or four years, owing to the reduction of rates by rail lines to that point from the West; but should the rates be raised from the West to Columbus competition would again ensue similar to what it was prior to 1881.” Thus it is claimed generally that rates to these competing points cannot be raised without endangering the business of the roads, while rates at intermediate points cannot be lowered without serious embarrassment of their revenue. As has been seen above, Opelika is “neither fish nor fowl.” Its treatment has not been consistent, nor has it been satisfactory either to the railroads or its citizens. It does not receive the low rates of the made centers, nor are the high rates charged at intermediate points exacted. It urgently desires to become a trade center, and insists that its situation as a branching point for several

railroads is one that entitles it to such consideration, even at the expense of the neighboring communities; while railroads have been unwilling to concede to it any other position than that conceded to local points between competitive points, using the fact of the injustice to neighboring communities as an excuse in this behalf.

It was the hope of the Commission after the announcement on June 15, 1887, of its decision upon the subject of the application of the fourth section in the Louisville and Nashville case, that the railroads in the South, as well as in other parts of the Union, would endeavor to reform their tariff schedules so as to bring them gradually into conformity with the general provision of the law. It was said in that opinion that "our observation and investigations so far made lead to the conclusion that strict conformity to the general rule is possible in large sections of the country without material injury to either public or private interests; and that in other sections the exceptions can be made and ought to be made much less numerous than they have been hitherto, and that when exceptions are admitted the charges should be less disproportionate."

Since the promulgation of that opinion and the full announcement of the views of the Commission therein made concerning the construction of the fourth section, the tariffs which are being daily received show that a reconstruction of the rates has been going on continually, with more or less effort to bring the same into harmony with the views then expressed. This effort has been observable upon many of the roads of the Southern States, as well as in other portions of the country.

The Commission has failed to observe upon the lines controlled by the Central Railroad Company of Georgia any decided effort towards a reconstruction of its rates in the directions suggested by its former opinion as required in order to conform to the provisions of the Act to regulate commerce. So far as the observation of the Commission goes, the system in force prior to April 5, 1887, is still substantially maintained upon that line. The old trade center rates are made to "competing points," and the local rates to interior points are added as before.

It is possible that the irregularities and inequalities in existing tariffs cannot be made entirely to disappear without a general readjustment of the arrangements under which traffic is interchanged, involving the adoption of a new system of the division of earnings between connecting lines, and a new system of making rates; but the Commission is satisfied that very extensive improvements are possible at once, and that very material changes in the present methods are required by the law.

These suggestions arise directly from the position taken by the defendants in their answers. It is not the intention of the Commission to dispose of such questions hastily, nor in the absence of a distinct understanding that they are presented for consideration and adjudication.

In disposing of the present petition it must be borne in mind that the complainants charge a violation only of the second and third sections of the Act to regulate commerce; but in attempting to justify the discriminations adopted and enforced in the Opelika rates the defendants claim that what are styled competitive rates are too low upon any view except that they are forced upon the roads by water competition; that the roads would raise them and equalize their rates generally but for that fact, which prevents their doing so, and that it is not unjust discrimination or undue or unreasonable prejudice, which is based upon physical facts and which recognizes only natural diversities of situation.

The weight of these claims have been conceded by the Commission in the case above referred to. Dissimilar circumstances and conditions, it was said, may be made out by "the existence of actual competition, which is of controlling force, in respect to traffic important in amount." Those words were chosen with care, and the limitations which they suggest are applicable when the controlling force of water competition is invoked in respect to the second and third sections of the act, as well as in respect to the fourth. The Commission, in expressing the result reached, named as an exceptional circumstance, to be proved if existent, the fact of "actual competition"—not possible competition likely to arise if rates are raised—"of controlling force"—not when

the rail line is the controlling force, but when the competing water line is able to dictate rates which will control the traffic unless met by the railroad—"in respect to traffic important in amount"—not when competition in a single direction or for the transportation of a single article or class of articles exists, but general competition of the character stated, controlling the carriage of the traffic on which the discrimination is made.

As has been said, the answer of the Columbus and Western Railroad Company, speaking of the lower rates now enjoyed by Montgomery and Columbus, says: "The reason is very plain; the railroads have water competition and are compelled to meet it." But that fact, without more, has not been held sufficient to justify the lesser charge for the greater distance, much less to justify the making of such tariffs as have been applied on the roads in question. The results are abnormal, not only at Opelika, but all along the line. They are simply less disproportionate at Opelika than at other points in its vicinity. There is no proof now before the Commission of actual competition, of controlling force, at Columbus. The evidence is to the contrary. Were it not for the knowledge heretofore acquired by the Commission respecting the competitive factors at Montgomery, it could hardly be claimed that anything in the nature of a justification is shown. The Commission is aware that an independent and active line of river steamers connects that point with the Atlantic seaboard via Mobile. How the defendants would attempt to justify such a disparity of rates as exists, for example, between Cowles and La Grange, or even between Opelika and La Grange, is not made manifest in this case.

As the case is now presented it seems clear that Opelika and other places in its vicinity are unjustly discriminated against, under the system of rate-making now in force; but it is not so clear that any relief can be given to Opelika upon the present petition.

It would tend to a correction of the discrimination if the interstate rates to Columbus and Montgomery should be raised, leaving intermediate rates as they are; but we do not understand that this is asked or expected by the petitioners,

and we should not be willing to entertain such a suggestion without awarding to the communities to be affected the opportunity of being heard thereon.

It is evident that the petitioners in their evidence and in their proposed relief are proceeding upon an assumption that the existing system is founded in the nature of things and is to be perpetuated. Under that system there are trade centers which enjoy special privileges, and Opelika deserves to be entitled to be placed in that class and to enjoy like privileges. It does not explicitly ask to have the long-and-short-haul clause of the statute enforced, and it is doubtful whether its enforcement would be for the interest of the merchants of Opelika.

What the petitioners ask is that the discrimination against their town in favor of Montgomery and Columbus be stopped. What they mean is that the rates at Opelika be reduced; but the order which they seek would increase the existing discrimination under the Ball Arbitraries in favor of Opelika, as against the local points on each side of it; this the Commission cannot now consent to direct. The relief of Opelika, in order to do no injustice to other points and to involve no violation of law in granting it, must be attended with a readjustment so general that other interests and localities should be first heard and their respective claims considered.

If the Commission were to grant such an order as the petitioners desire, it might be understood, in view of existing conditions and of the position taken in defendant's answer, to decide that the circumstances prevailing in the district about Opelika are such as to justify making that city an exception under the fourth section of the Act to regulate commerce, as against the local stations about it; but no order can be made in this case at the present time which shall authorize such an exception for two very obvious reasons: First, the question whether the circumstances and conditions are exceptional in fact to an extent that would warrant an order was not presented by the petition in the case, and no proofs upon that subject are before us showing any ground for such exception; second, the points that would be injuri-

ously affected by such an order are not before the Commission and have no opportunity to be heard.

In view of what has been above said, it may be that the defendants will recognize the necessity of making a revision of their rates with a view to lessen the discrepancy between the rates at Montgomery and Columbus and those at intermediate points. Should they do so to the satisfaction of the complainants no further proceedings upon this petition will be necessary.

But if that is not done and complainants desire to proceed further they should be allowed to amend their petition so as to set out the facts on which they claim for themselves lower rates than are given to towns nearer Atlanta, Montgomery, and Columbus. The Commission will then make an order for notifying the localities to be affected and for further hearing upon the questions so presented. If the general subject of freight rates from points in other States to the various points on the line of the defendants' roads, including Opelika, is to be brought before the Commission, the petition may be so amended as to distinctly so state, for defendant's action would be materially influenced by the nature of the relief asked, and the other towns could also be advised of the matters pending affecting their interests; and if, on the other hand, complainants shall see fit to ask for a strict enforcement of the long-and-short-haul clause as against Columbus and Montgomery, or either, they will still need an amendment to their petition, and in that case the towns which are now favored with the lower charges on the shorter hauls could be given an opportunity for a hearing.

The complaint makes an independent point of the treatment to which Opelika is subjected by the carriers in respect to the article of cotton. It is said that the rate from Opelika to Savannah via Columbus and the Georgia Central is 52 cents per hundred, while the rate to the same point by the same system from both Montgomery and Columbus is but 45 cents. The causes and methods operating to produce this result are the same above described and commented on. It is further said that Opelika has no through rate to New Orleans at all on cotton, and can get none from the railroad authorities, although it has good and ample facilities for the

handling of cotton, and formerly shipped 26,000 bales per year, now reduced to from 12,000 to 15,000 bales. The rate on cotton from Montgomery to New Orleans is 45 cents per hundred, and the local rate charged Opelika on cotton to Montgomery is 27 cents, making 72 cents to New Orleans, which shuts the door against that market, leaving it only the Savannah outlet.

These facts are not denied by the defendants. All that we have upon this subject from them is contained in the following paragraph from the answer filed by Mr. Gabbett for the Western Railway of Alabama :

“As to the charge that no through bills of lading are being issued by this road from Opelika to New Orleans, La., we would say that they were issued on the same basis that freights between Opelika and other places were charged, until a promise of rebates or secret rates to some of the merchants of Opelika by certain officers or agents of competing lines from Montgomery, an attempt was made to divert cotton from its ordinary and proper channel to New Orleans, was communicated to this company.

“With this information before us we ceased to give any through bills over the lines that we had reason to believe were seeking in an improper and underhanded way to draw freight from the roads over which it would naturally pass. We did this, as we were informed, in strict conformity to our legal right, to become responsible only beyond our own line for such roads, as our own judgment and experience, taught us to be safe, and to our interest.”

This averment is not supported by any proof, and, if true, it amounts simply to this : that some undisclosed connection of the defendant once made an offer of rebates to the merchants of Opelika for the purpose of getting the business away from what defendant considered its “ordinary and proper channel to New Orleans.” It is not averred that the lines to New Orleans will not now unite in making the usual through rates, and no reason whatever is stated why through rates and through bills of lading on cotton are not given over the line which forms the aforesaid “ordinary and proper channel.”

It appears from the papers in the case and from statements made on the hearing that through rates on cotton were formerly made from Opelika to New Orleans on the same basis that other freights were treated, as above described: also that after Opelika was punished in the manner stated by Mr. Gabbett for the efforts of competing lines to divert the traffic, through rates were given to New Orleans on cotton passing directly through Opelika from other points. It is not stated that the alleged "rebates or secret rates" have been offered since the passage of the Act to regulate commerce, and it is understood that the through rates to New Orleans were taken away from Opelika some time before that date, and have not been restored, although such rebates would be now illegal. It is not even said that any Opelika dealer ever received such a rebate, but only that a "promise" of that nature was "communicated to this company."

Through bills of lading on cotton are an important facility in its transportation as now conducted; drafts drawn with such bills of lading attached are a basis of credit throughout the South. They ought not, therefore, to be refused without some substantial reason, and none is shown here.

From all the evidence before the Commission it finds the facts to be that through rates and through bills of lading on cotton offered for shipment at Opelika for New Orleans are unjustly and unreasonably refused by the defendant, The Western Railway of Alabama, while given by said road on other commodities and at other points similarly situated, and while said defendant's connecting lines making the route to New Orleans are ready and willing to unite therein; and also that Opelika is thereby subjected to undue and unreasonable prejudice and disadvantage, in violation of the provisions of the third section of the Act to regulate commerce.

An order will be made requiring said defendant to cease and desist from such violation within ten days after receiving a copy of the same.

The petition in other respects is retained, with leave to complainants to file amendments or an amended petition in accordance with the views above expressed.

REPORT

OF THE

INTERSTATE COMMERCE COMMISSION.

HON. LUCIUS Q. C. LAMAR,
Secretary of the Interior :

SIR : The undersigned, Commissioners appointed under "An act to regulate commerce," approved February 4, 1887, in discharge of the duty imposed by the twenty-first section of said act, which directs the Commission on or before the first day of December in each year to make a report to the Secretary of the Interior, to be by him transmitted to Congress ; the report to "contain such information and data collected by the Commission as may be considered of value in the determination of questions connected with the regulation of commerce, together with such recommendations as to additional legislation relating thereto as the Commission may deem necessary," beg leave respectfully to report :

PRELIMINARY.

It is provided in the act referred to that its provisions shall apply to—

Any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used, under a common control, management, or arrangement for a continuous carriage or shipment from one State or Territory of the United States or the District of Columbia to any other State or Territory of the United States or the District of Columbia, or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States, and also to the transportation in like manner of property shipped from any place in the United States to a foreign country, and carried from such place to a port of transshipment, or shipped from a foreign country to any place in the United States, and carried to such place from a port of entry either in the United States or an adjacent foreign country. *Provided, however,* That the provisions of this act shall not apply to the

transportation of passengers or property, or to the receiving, delivering, storage, or handling of property wholly within one State, and not shipped to or from a foreign country from or to any State or Territory as aforesaid.

It is further provided that—

The term "railroad" as used in this act shall include all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any corporation operating a railroad, whether owned or operated under a contract, agreement or lease; and the term "transportation" shall include all instrumentalities of shipment or carriage.

Magnitude of the Railroad Interest.—The railroad mileage of the United States, computed to the close of the fiscal year 1886, of the companies respectively, was 133,606. The number of corporations represented in this mileage was 1,425, but by the consolidation or leasing of roads the number of corporations controlling and operating roads as carriers was reduced to 700. It is estimated that 4,330 miles of road have been constructed since the foregoing statistics were obtained, making a total mileage at this time 137,986. It is impossible to say with entire accuracy what is the number of railroad companies subject to the provisions of the act, but it is believed that not less than 1,200, operated by about 500 corporations as carriers, engage either regularly or at times in interstate commerce, so as to make the act applicable. The Commission has as yet no statistics of its own collection to lay before the public, but in a manual generally accepted as reliable the cost of construction and equipment of the 133,606 miles of road is estimated at \$7,254,995,223, and the funded debt of the companies at \$3,882,966,330. Interest, according to the same authority, was paid by these companies for the last fiscal year to the amount of \$187,356,540, and the aggregate payment to stockholders in dividends was \$80,094,138.

Some idea of the magnitude of the interest which the act undertakes to regulate may be obtained from these figures, but they fall far short of measuring, or even of indicating, its importance. The regulation of no other business would concern so many or such diversified interests, or would affect in so many ways the results of enterprise, the prosperity of commercial and manufacturing ventures, the intellectual and social intercourse of the people, or the general comfort and

convenience of the citizen in his every-day life. The railroads provide for the people facilities and conveniences of a business and social nature which have become altogether indispensable, and the importance of so regulating these that the best results may be had, not by the general public alone, but by the owners of railroad property also, is quite beyond computation.

REGULATION OF COMMERCE--HISTORICAL.

The Act to regulate commerce was passed under the authority conferred upon Congress by the Federal Constitution "to regulate commerce with foreign nations, among the several States, and with the Indian tribes," and in recognition of a duty which, though long delayed, had at length, in the opinion of Congress, become imperative. The reasons for the delay are well understood. When the grant of this power of regulation was made by the Constitution the commerce between the States which might be controlled under it was quite insignificant both in volume and value. It was for the most part carried on by means of coastwise vessels and by water craft of various kinds which were sailed or otherwise propelled on the lakes, rivers and smaller streams of the interior. On the land there was very little that could be said to rise to the dignity of interstate commerce, and the regulation of that little, as also of that which was exclusively State traffic, was for the most part left to the rules of the common law. The exceptional regulations, if any seemed to be called for, were made by the State laws. In a few cases where persons had associated themselves together as regular carriers of persons on definite routes, exclusive rights were granted to them by the States as such carriers, the motive to such grants being a belief on the part of the State authorities that without the exclusive privilege the regular transportation would not be adequately and reliably provided for.

For the regulation of commerce on the ocean and other navigable waters Congress very promptly passed the necessary laws; but its jurisdiction within the limits of the States was not very clearly understood, and it was not until the great case of *Gibbons v. Ogden*, decided in 1824, that it was

authoritatively and finally determined that the waters of a State, when they constituted a highway for foreign and interstate commerce, are, so far as concerns such commerce, as much within the reach of Federal legislation as are the high seas; and consequently that exclusive rights for their navigation cannot be granted by States whose limits embrace them.

But while providing from time to time for the regulation of commerce by water Congress still abstained from undertaking the regulation of commerce by land. The reasons for this continued to be the same as at the first. The land commerce was insignificant in amount, and the rules of the common law were in general found adequate to the settlement of the questions arising out of it. The commerce of trappers and hunters, of traders with the Indians, or that of the early settlers in the wilderness, needed only the most primitive modes of conveyance; the emigrant wagon in one direction and the pack-horse and canoe in the other, performed in respect to it the functions now performed by the railroad train and the steamboat. The use of such primitive instrumentalities required little regulation by either state or national law. When Congress provided for the construction of the Cumberland road as a great national highway it was thought quite undesirable to regulate its use by national law or to take national supervision of the commerce upon it; and, with the commerce on the ordinary highways, it was left to the supervision and care of the States respectively through or into which the road should be built.

With the application of steam as a motive power for propelling vessels the conditions were immediately, to a considerable extent, changed. An impetus was given to the internal commerce of the country which promised immense results, and which made immediate and imperative demand for other and very different highways to those which accommodated the pack-horses and heavy wagons of the early traders and settlers. But even then the circumstances were favorable to a prolongation of State control. The first improved highways were turnpikes; the next in grade were canals; but the highways by water as well as the highways by land were pro-

vided for by the States. The General Government made some appropriations for canals where they were needed as improvements in existing navigation, but the great artificial channels of water transportation were State creations. Such was the case with the Erie Canal, which during the period when emigration to the wilderness was greatest, and when improvement in the new Territories was most rapid, constituted the most important of all the highways connecting the interior with the seaboard. Such also were the canals which were constructed to connect the Delaware with the Hudson, the Chesapeake with the Ohio, the waters of Lake Erie with the Ohio at Portsmouth, at Cincinnati, and at Evansville, the waters of Lake Michigan with the Mississippi, and many others now almost forgotten, but which were of great temporary importance and value.

As the States constructed these great interstate highways, it was not unnatural that they should be left in charge of the regulation of trade upon them, especially as no complaint was made that their regulations were unjust, or that they discriminated unfairly as against the citizens or the business of other States. When, in 1830, steam power began to be applied to the propulsion of vehicles upon land, the same reasons as regards control continued to prevail. The roads constructed for such vehicles were authorized by and built under the authority of the States; the corporate charters under which they were operated, and which prescribed the rights, privileges, and powers of the associated owners were State laws; the States determined for them the measure of their taxation, and limited if it seemed politic their charges and their profits. The States thus touched them so nearly in all their interests and all their functions that Federal intervention seemed not only unnecessary but intrusive unless State power should be abused; and the abuse not often appearing, intervention was scarcely thought of by any one.

For a long time, therefore, the power of the Federal Government in the regulation of commerce between the States was put forth by way of negation rather than affirmatively; that is to say, it was put forth in restraint of excessive State power when it appeared, instead of by way of affirmative

national regulation. The national restraint, when there was any, was commonly effected by invoking the action of the judicial department of the Government, and by its assistance arresting such State action as appeared to constitute an unauthorized interference with interstate traffic and intercourse. This special intervention, whether in the exercise of an original jurisdiction, as in the *Wheeling Bridge* case, reported in 13 Howard, 518, or under an appellate authority, as in *Ward v. Maryland* (12 Wallace, 418), and *Welton v. Missouri* (91 United States Reports, 275), has been important and useful in a considerable number of cases, but in the nature of things it could not accomplish the purposes of general regulation. On the other hand, the effect was to leave the corporations, into whose hands the internal commerce of the country had principally fallen, to make the law for themselves in many important particulars—the State power being inadequate to complete regulation, and the national power not being put forth for the purpose.

The common law still remained operative, but there were many reasons why it was inadequate for the purposes of complete regulation. One very obvious reason was that the new method of land transportation was wholly unknown to the common law, and was so different from those under which common-law rules has grown up, that doubts and differences of opinion as to the extent to which those rules could be made applicable were inevitable. A highway of which the ownership is in private citizens or corporations who permit no other vehicles but their own to run upon it bears obviously but faint resemblance to the common highway upon which every man may walk or ride or drive his wagon or his carriage. If we undertake to apply to the one the rules which have grown up in regulation of the others, there must necessarily be a considerable period in which the state of the law will, in many important particulars, be uncertain, and while that continues to be the case, those who have the power to act, and who must necessarily act by rule and according to some established system, will for all practical purposes make the law, because the rule and the system will be of their establishment.

Such, to a considerable extent, has been the fact regarding the business of transporting persons and property by rail.

Those who have controlled the railroads have not only made rules for the government of their own corporate affairs, but very largely also they have determined at pleasure what should be the terms of their contract relations with others, and others have acquiesced, though oftentimes unwillingly, because they could not with confidence affirm that the law would not compel it, and a test of the question would be difficult and expensive. The carriers of the country were thus enabled to determine in great measure what rules should govern the transportation of persons and property; rules which intimately concerned the commercial, industrial, and social life of the people.

The circumstances of railroad development tended to make this indirect and abnormal law-making exceedingly unequal and oftentimes oppressive. When railroads began to be built the demand for participation in their benefits went up from every city and hamlet in the land, and the public was impatient of any obstacles to their free construction and of any doubts that might be suggested as to the substantial benefit to flow from any possible line that might be built. Under an imperative popular demand general laws were enacted in many States which enabled projectors of roads to organize at pleasure and select their own lines; and where there were no such laws the grant of a special charter was almost a matter of course, and the securities against abuse of corporate powers was little more than nominal. For a long time the promoter of a railway was looked upon as a public benefactor, and laws were passed under which municipal bodies were allowed to give public money or loan public credit in aid of his schemes on an assumption that almost any road would prove reasonably remunerative, but that in any event the indirect advantages which the public would reap must more than compensate for the expenditures.

In time it came to be perceived that these sanguine expectations were delusive. A very large proportion of all the public money invested in railroads was wholly sunk and lost.

Many roads were undertaken by parties who were without capital, and who relied upon obtaining it by a sale of bonds to a credulous public. The corporation thus without capital was bankrupt from its inception, and the corporators were very likely to be mere adventurers who would employ their chartered powers in such manner as would most conduce to their personal ends.

CORPORATE ABUSES.

It is striking proof of the recklessness of corporate management that 108 roads, representing a mileage of 11,066, are now in the hands of receivers, managing them under the direction of courts, whose attention is thus necessarily withdrawn from the ordinary and more appropriate duties of judicial bodies. So serious has been the evil of bringing worthless schemes into existence and making them the basis for an appropriation of public moneys or for the issue of worthless evidences of debt, that a number of the States have so amended their constitutions as to take from the legislature the power either to lend the credit of the State in aid of corporations proposing to construct railroads, or to authorize municipal bodies to render aid, either in money or credit. State legislation has at the same time been in the direction of making compulsory the actual payment of a bona fide capital before a corporation shall be at liberty to test the credulity of the public by an issue of negotiable securities.

Excessive Competition—When roads were built for which the business was inadequate, the managers were likely to seek support by entering upon competition for business which more legitimately belonged to the other roads, and which could only be obtained by offering rates so low that if long continued they must prove destructive. A competitive warfare was thus opened up in which each party endeavored to underbid the other, with little regard to prudential considerations, and freights were in a great many cases carried at a loss, in the hope that in time the power of the rival to continue the strife would be crippled and the field practically left to a victor who could then make its own terms with customers.

Rebates and Special Rates.—When the competition was less extreme than this, there was still a great deal of earnest strife for business, some of which was open and with equal offerings of rates and accommodations to all, but very much of which was carried on secretly, and then the very large dealers practically made their own terms, being not only accommodated with side tracks and other special conveniences, but also given what were sometimes spoken of as wholesale rates, or perhaps secret rebates, which reduced the cost to them of transportation very greatly below what smaller dealers in the same line of business were compelled to pay. Such allowances were sufficient of themselves in very many cases to render successful competition, as against those who had them, practically impossible.

The system of making special arrangements with shippers was in many parts of the country not confined to large manufacturers and dealers, but was extended from person to person under the pressure of alleged business necessity, or because of personal importunity or favoritism, and even in some cases from a desire to relieve individuals from the consequences of previous unfair concessions to rivals in business. The result was that shipments of importance were commonly made under special bargains entered into for the occasion, or to stand until revoked, of which the shipper and the representative of the road were the only parties having knowledge. These arrangements took the form of special rates, rebates, and drawbacks, underbilling, reduced classification, or whatever might be best adapted to keep the transaction from the public: but the public very well understood that private arrangements were to be had if the proper motives were presented. The memorandum-book carried in the pocket of the general freight agent often contained the only record of the rates made to the different patrons of the road, and it was in his power to place a man or a community under an immense obligation by conceding a special rate on one day, and to nullify the effect of it on the next by doing even better by a competitor.

This system, if it can be called such, involved a great measure of secrecy, and its necessary conditions were such

as to prevent effective efforts to break it down, though the willingness to make the effort was not wanting among intelligent shippers. It was of the last importance to the shipper that he be on good terms with those who made the rates he must pay; to contend against them was sometimes regarded as a species of presumption which was best dealt with by increasing existing burdens; and the shipper was cautious about incurring the risk. Nevertheless it was a common observation, even among those who might hope for special favors, that a system of rates, open to all, and fair as between localities, would be far preferable to a system of special contracts into which so large a personal element entered or was commonly supposed to enter. Permanence of rates was also seen to be of very high importance to every man engaging in business enterprises, since without it business contracts were lottery ventures. It was also perceived that the absolute sum of the money charges exacted for transportation, if not clearly beyond the bounds of reason, was of inferior importance in comparison with the obtaining of rates that should be open, equal, relatively just as between places, and as steady as in the nature of things was practicable.

Special favors or rebates to large dealers were not always given because of any profit which was anticipated from the business obtained by allowing them; there were other reasons to influence their allowance. It was early perceived that shares in railroad corporations were an enticing subject for speculation, and that the ease with which the hopes and expectations of buyers and holders could be operated upon pointed out a possible road to speedy wealth for those who should have the management of the roads. For speculative purposes an increase in the volume of business might be as useful as an increase in net returns; for it might easily be made to look to those who knew nothing of its cause like the beginning of great and increasing prosperity to the road. But a temporary increase was sometimes worked up for still other reasons: such as to render plausible some demand for an extension of line, or for some other great expenditure, or to assist in making terms in a consolidation, or to strengthen the demand for a larger share in a pool.

Whatever was the motive, the allowance of the special rate or rebate was essentially unjust and corrupting; it wronged the smaller dealer, oftentimes to an extent that was ruinous, and it was very generally accompanied by an allowance of free personal transportation to the larger dealer, which had the effect to emphasize its evils. There was not the least doubt that had the case been properly brought to a judicial test these transactions would in many cases have been held to be illegal at the common law; but the proof was in general difficult, the remedy doubtful or obscure, and the very resort to a remedy against the party which fixed the rates of transportation at pleasure, as has already been explained, might prove more injurious than the rebate itself. Parties affected by it, therefore, instead of seeking redress in the courts, were more likely to direct their efforts to the securing of similar favors on their own behalf. They acquiesced in the supposition that there must or would be a privileged class in respect to rates, and they endeavored to secure for themselves a place in it.

Other Discriminations.—Personal discrimination in rates was sometimes made under the plausible pretense of encouraging manufacturers or other industries. It was perhaps made a bargain in the establishment of some new business or in its removal from one place to another that its proprietors should have rates more favorable than were given to the public at large; and this, though really a public wrong, because tending to destroy existing industries in proportion as it unfairly built up others, was generally defended by the parties to it on the ground of public benefit.

Local-discriminations, though not at first blush so unjust and offensive, have nevertheless been exceedingly mischievous, and if some towns have grown, others have withered away under their influence. In some sections of the country if rates were maintained as they were at the time the interstate commerce law took effect, it would have been practically impossible for a new town, however great its natural advantages, to acquire the prosperity and the strength which would make it a rival of the towns which were specially favored in rates, for the rates themselves would establish for

it indefinitely a condition of subordination and dependence to "trade centers." The tendency of railroad competition has been to press the rates down and still further down at these trade centers, while the depression at intermediate points has been rather upon business than upon rates. In very many cases it has resulted in the charging of more for a short than for a long haul on the same line in the same direction; and though this has been justified by railroad managers as resulting from the necessities of the situation, it is not to be denied that the necessity has in many cases been artificially created, and without sufficient reason.

The inevitable result was that this management of the business had a direct and very decided tendency to strengthen unjustly the strong among the customers and to depress the weak. These were very great evils, and the indirect consequences were even greater and more pernicious than the direct, for they tended to fix in the public mind a belief that injustice and inequality in the employment of public agencies were not condemned by the law, and that success in business was to be sought for in favoritism rather than in legitimate competition and enterprise.

The Pass System.—The evils of free transportation of persons were not less conspicuous than those which have been mentioned. This, where it extended beyond the persons engaged in railroad service, was commonly favoritism in a most unjust and offensive form. Free transportation was given not only to secure business but to conciliate the favor of localities and of public bodies; and, while it was often demanded by persons who had, or claimed to have, influence which was capable of being made use of to the prejudice of the railroads, it was also accepted by public officers of all grades and of all varieties of service. In these last cases the pass system was particularly obnoxious and baneful; for if any return was to be made or was expected of public officers, it was of something which not theirs to give, but which belonged to the public or to constituents. A ticket entitling one to free passage by rail was often more effective in enlisting the assistance and support of the holder than its value in money would have been, and in a great many cases it would be re-

ceived and availed of when the offer of money, made to accomplish the same end, would have been spurned as a bribe. Much suspicion of public men resulted, which was sometimes just, but also sometimes unjust and cruel; and some deterioration of the moral sense of the community, traceable to this cause, was unavoidable while the abuse continued. The parties most frequently and most largely favored were those possessing large means and having large business interests.

The general fact came to be that in proportion to the distance they were carried those able to pay the most paid the least. One without means had seldom any ground on which to demand free transportation, while with wealth he was likely to have many grounds on which he could make it for the interest of the railroad company to favor him, and he was sometimes favored with free transportation not only for himself and his family but for business agents also, and even sometimes for his customers. The demand for free transportation was often in the nature of blackmail, and was yielded to unwillingly and through fear of damaging consequences from a refusal. But the evils were present as much when it was extorted as when it was freely given.

Other Abuses.—These were some of the evils that made interference by national legislation imperative. But there were others that were of no small importance. Rates when there was no competition were sometimes so high as to be oppressive, and when competition existed by lines upon which the public confidently relied to protect them against such a wrong, a consolidation was effected and the high rates perpetuated by that means. In some cases the roads, created as conveniences in transportation, were so managed in respect to business passing or destined to pass over other roads that they constituted hindrances instead of helps, to the great annoyance of travel and to the serious loss of those who intrusted their property to them. Then their rates were changed at pleasure and without public notification; their dealings to a large extent were kept from the public eye, the obligation of publicity not being recognized; and the public were therefore without the means of judging whether their

charges for railroad service were reasonable and just or the contrary.

But the publications actually made only increased the difficulties. Railroad rates, difficult enough to be understood by the uninitiated when printed plainly in one general tariff with classification annexed, became mysterious enigmas when several different tariffs were printed, as was the case in some sections ; some relating to competitive points and others to what were called local points, and each referring to voluminous and perhaps different classifications, which were printed but not posted, and which were observed or disregarded at will in the rates as published. Such unsystematic and misleading publications naturally led to many overcharges and controversies, and naturally invited and favoured special rates and injurious preferences.

These were serious evils ; and they not only to some extent blunted the sense of right and wrong among the people and tended to fix an impression upon the public mind that unfair advantages in the competition of business were perfectly admissible when not criminal, but they built up or strengthened a class feeling and embittered the relations between those who for every reason of interest ought to be in harmony. It was high time that adequate power should be put forth to bring them to an end. Railroads are a public agency. The authority to construct them with extraordinary privileges in management and operation is an expression of sovereign power, only given from a consideration of great public benefits which might be expected to result therefrom. From every grant of such a privilege resulted a duty of protection and regulation, that the grant might not be abused and the public defrauded of the anticipated benefits.

The abuses of corporate authority to the injury of the public were not the only reasons operating upon the public mind to bring about the legislation now under consideration ; some other things which in their direct effects were wrongs to stockholders only had their influence also, and this by no means a light one. The manner in which corporate stocks were manipulated for the benefit of managers and to the destruction of the interest of the owners was often a great

scandal, resulting sometimes in the bankruptcy and practical destruction of roads which, if properly managed, would have been not only profitable but widely useful. This in its direct results might be a wrong to individuals only, but in its indirect influence it was a great public wrong also.

The most striking and obvious fact in such a case commonly is that persons having control of railroads have in a very short time, by means of the control, amassed great fortunes. The natural conclusion which one draws who must judge from surface appearances is, that these fortunes are unfairly acquired at the expense of the public ; that they represent excessive charges on railroad business, or unfair employment of inside privileges, and furnish in themselves conclusive evidence that current rates are wrong and probably extortionate. An impression of this sort, when it happens to be wide of the fact, is for many reasons unfortunate. It creates or strengthens a prejudice against all railroad management—the honest as well as the dishonest—which affects the public view of all railroad questions ; it renders it more difficult to deal with such questions calmly and dispassionately ; it makes the public restive under the charges they are subjected to, even though they be moderate and necessary ; it tends to strengthen a feeling among the unthinking that capital represents extortion. However careful, considerate, fair and just the management of any particular road may be, and however closely it may confine itself to its legitimate business, it is impossible that it should wholly escape the ill effects of this prejudice, which are visited upon all roads because some conspicuous railroad managers have, by their misconduct, given in the public mind a character to all.

Evils of the class last mentioned were difficult of legislative correction, because they sprang from the over-confidence of stockholders in the officers chosen to manage their interests, and whose acts at the time they perhaps assented to. But if capable of correction by any legislative authority, it was in general that of the States, not that of the nation. The States in the main conferred the corporate power, and it was for the States by their legislation to provide for the protection of the individual interests which were brought into ex-

istence by their permission. The National Government had to do with the commerce which these artificial entities of State creation might be concerned in. Nevertheless, the manifest misuse of corporate powers strengthened the demand for national legislation, and this very naturally, because the private gains resulting from corporate abuse were supposed to spring, to some extent at least, from excessive burdens imposed upon the commerce which the nation ought to regulate and protect.

For the purpose of correcting the evils above alluded to, so far as it was constitutionally competent for national legislation to do so, the Act to regulate commerce lays down certain rules to be observed by the carriers to which its provisions apply, which are intended to be, and emphatically are, rules of equity and equality; and which, if properly observed, ought to, and in time no doubt will, restore the management of the transportation business of the country to public confidence.

THE ACT TO REGULATE COMMERCE.

The leading features of the act are the following :

All charges made for services by carriers subject to the act must be reasonable and just. Every unjust and unreasonable charge is prohibited and declared to be unlawful.

The direct or indirect charging, demanding, collecting or receiving, for any service rendered, a greater or less compensation from any one or more persons than from any other for a like and contemporaneous service, is declared to be unjust discrimination and is prohibited.

The giving of any undue or unreasonable preference, as between persons or localities, or kinds of traffic, or the subjecting any one of them to undue or unreasonable prejudice or disadvantage, is declared to be unlawful.

Reasonable, proper and equal facilities for the interchange of traffic between lines, and for the receiving, forwarding and delivering of passengers and property between connecting lines is required, and discrimination in rates and charges as between connecting lines is forbidden.

It is made unlawful to charge or receive any greater com-

pensation in the aggregate for the transportation of passengers or the like kind of property under substantially similar circumstances and conditions for a shorter than for a longer distance over the same line in the same direction, the shorter being included within the longer distance.

Contracts, agreements, or combinations for the pooling of freights of different and competing railroads, or for dividing between them the aggregate or net earnings of such railroads or any portion thereof, are declared to be unlawful.

All carriers subject to the law are required to print their tariffs for the transportation of persons and property, and to keep them for public inspection at every depot or station on their roads. An advance in rates is not to be made until after ten days' public notice, but a reduction in rates may be made to take effect at once, the notice of the same being immediately and publicly given. The rates publicly notified are to be the maximum as well as the minimum charges which can be collected or received for the services respectively for which they purport to be established.

Copies of all tariffs are required to be filed with this Commission, which is also to be promptly notified of all changes that shall be made in the same. The joint tariffs of connecting roads are also required to be filed, and also copies of all contracts, agreements, or arrangements between carriers in relation to traffic affected by the Act.

It is made unlawful for any carrier to enter into any combination, contract, or agreement, expressed or implied, to prevent, by change of time schedules, carriage in different cars, or by other means or devices, the carriage of freights from being continuous from the place of shipment to the place of destination.

These, shortly stated, are the important provisions of the Act which undertakes to prescribe the duties and obligations of the carriers which by its passage are brought under Federal control. Some important exceptions are made by the twenty-second section, which provides :

That nothing in this act shall apply to the carriage, storage, or handling of property free or at reduced rates for the United States, State, or municipal governments, or for charitable purposes, or to or from fairs and expositions.

tions for exhibition thereat, or the issuance of mileage, excursion, or commutation passenger tickets; nothing in this act shall be construed to prohibit any common carrier from giving reduced rates to ministers of religion; nothing in this act shall be construed to prevent railroads from giving free carriage to their own officers and employees, or to prevent the principal officers of any railroad company or companies from exchanging passes or tickets with other railroad companies for their officers and employees; and nothing in this act contained shall in any way abridge or alter the remedies existing at common law or by statute, but the provisions of this act are in addition to such remedies.

These provisions, it will be seen, are not intended to qualify to any injurious extent the general rules of fairness and equality which the act has been so careful to prescribe, and the exceptions may all be said to be authorized on public considerations.

In the performance of its duties the Commission has had occasion to decide that the transportation of Indian supplies may be free or at reduced rates under this section (1 Interstate Commerce Commission Reports, p. 15), as also may be that of the agents and material of the United States Fish Commission (*Ibid.*, p. 21). The question of what may be included under the exception made for charitable purposes has never come before the Commission in such form as to call for an expression of opinion. It will be noted that in terms it applies to property only, not to persons.

By the eleventh section of the act this Commission is created and established, and other sections prescribe its duties and powers. Those sections it will be necessary to consider somewhat at length further on.

The Commission was organized March 31, 1887, and entered at once upon the discharge of its duties. The other provisions of the act took effect April 5, 1887. The demands upon its attention were immediate, and some of them of a very perplexing nature. It will be more convenient to take notice of these under specific heads in connection with the provisions of the act under which they were severally presented for its action.

THE CARRIERS SUBJECT TO ITS JURISDICTION.

These are indicated by general designation in the first section of the act, and the provision on that subject has already

been recited. By reference thereto it will be seen that it embraces the carriers "engaged in the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used, under a common control, management, or arrangement, for a continuous carriage or shipment," in interstate or international commerce.

Carriers by Water.—It does not embrace the carriers wholly by water, though they also may be engaged in the like commerce, and as such be rivals of the carriers which it undertakes to control. For the omission to include them many reasons may be suggested, but perhaps the most influential were that the evils of corporate management had not been so obvious in the case of carriers by water as in that of carriers by land, and moreover the rates of transportation by water were so extremely low that they were seldom complained of as a grievance even when they were unequal and unjustly discriminating. In their competition with the carriers by land the carriers by water were sometimes at a disadvantage and compelled to accept lower rates, and this also had some influence in propitiating public favor, inasmuch as they appeared to operate as obstacles to monopoly and as checks upon extortion.

But some of the railroad practices which the act undertakes to bring to an end have been common among carriers by water also, and if wrong in themselves might justly be forbidden in their case as well. The carriers by water discriminate between their customers on grounds not sanctioned by equity when interest seems to require it; they make rates at pleasure, they put up and put down rates suddenly without public notification, they make secret rebates to secure the business of large dealers, they charge less in some cases for a longer than for a shorter transportation over the same line in the same direction, the shorter being included in the longer distance.

It is not intended, however, by this enumeration to intimate an opinion that these things are common. The fact that there has been no general public complaint of them may be regarded as strong and perhaps conclusive evidence to the contrary. But, as the statutory law now is, they may be

practiced at pleasure ; and the fact that they may be is very likely to lead rivals in business to suspect that they are so practiced much oftener than is actually the case. The existence of such a suspicion, with plausible ground for it, naturally tempts to retaliatory measures of a similar nature where escape from detection is thought likely, and the enforcement of the law as against those who are subject to it is made more troublesome and less certain by the fact that one class of competitors for business is restrained while the other is left at full liberty.

It may be worthy the careful attention of Congress whether the same rules of fairness and equality ought not to be applied to all carriers whose operations subject them to the Federal power ; whether those by water as well as those by land ought not in particular to be required to publish their rates, to maintain them steadily, and to apply them impartially, and ought not to be forbidden to give secret rebates.

Such rules, prescribed and enforced, would take away much of the present temptation on the part of carriers by land to violate or evade the law, and would, besides, be intrinsically just and right.

Express Carriers.—The question whether another class of carriers is within the contemplation of the act is not so clear. We refer now to those who are engaged in the express business of the country. This business has an origin more recent than that of railroad transportation ; it began in a very small way, but it has grown to immense proportions, and now constitutes a large and increasing share of the business done by rail. Of the carriers engaged in this business there are several classes.

Some are partnerships of individual members, or joint associations constituting a species of statutory partnership, but resembling corporations in having the interests of the members represented by shares in a capital stock, and also in provisions made for perpetuity.

Some are corporations organized under State charters or general incorporation acts.

These have their several names as express companies, and as such they make bargains with the railroad companies

for the transportation of their freight and their agents at a compensation agreed upon. This compensation is likely to be a definite share in the gross receipts from the freight traffic, and each of the several express companies has a territory of its own, so that each road carries the freight and the agents of one only.

Some of the railroad companies, however, have undertaken to do the express business on their own lines through their own agencies. The Baltimore and Ohio Railroad Company did this for a time, and then sold the business to one of the existing express companies. Some of the Western railroads combine for the purpose, and for convenience create a nominal corporation to do the business over their several lines and divide the net proceeds. In organization and general methods this corporation resembles some of the fast freight lines of the country, the railroad companies being the nominal corporators and the business done being in every sense railroad business, though for convenience carried on by the several companies through a common agency.

There is no recognized distinction between what shall be considered express freight and what not, except that which concerns the method of transportation. Express freight is commonly but not always taken in cars attached to passenger trains, and, however taken, it is expedited beyond what is possible with freight in general, and any freight is taken express for which the owner consents to pay the charges. These charges are much greater than are made upon ordinary freight of like or similar kind.

Immediately after the organization of the Commission the question was presented whether the express companies of the country were under obligation to file their tariffs in its office. If they came within the enumeration of carriers in the first section of the act, the obligation was upon them ; but not if that enumeration failed to include them. The Commission deemed it prudent to rule, until satisfied to the contrary, that they were included, inasmuch as that ruling could harm no one and was in the direction of safety. The Canadian, the Northern Pacific, and the Dominion Express Companies acquiesced in this ruling and filed tariffs, but the

companies for the most part objected, and it was deemed advisable to offer them an opportunity to present their views. This was accordingly done; able counsel appeared to argue the question, and it was very fully and carefully considered.

Many arguments were urged on the part of the companies which are admitted to be forcible. The Act was examined in detail, and it was contended that on a fair construction of the terms made use of, the express companies could not be embraced. The history of the legislation was also discussed, and it was urged that the public demand for legislative regulation of railroad traffic had been made upon grounds which did not apply to the express traffic; the express companies had not practiced secret rebates, they had not so frequently made the greater charges for the shorter hauls, they had not made unjust discriminations between persons or places. The argument *ab inconvenienti* was also pressed with great earnestness; it was said to be practically impossible for the express companies to print and publish their tariffs; so numerous are the points to which their business extends; and it was even said that so voluminous would they be that no public building at the National Capitol could contain them.

The Commission has felt the force of the considerations urged so far as they are drawn from the phraseology of the law, but the other arguments have not appeared to be so weighty. The Commission cannot agree that any serious difficulty would be found in the making and filing of the express tariffs. The companies have no difficulty now in putting into the hands of their agents a tariff which the agents can understand and work by, and which at the same time is neither great in bulk nor cumbrous in use. What the express agent can understand it is fair to assume other people can understand also, and it would impose no hardship upon the express company to require that it be kept where the public can inspect it at pleasure. The objection made to this publication is precisely the same that was made by some railroad companies to the publication of their tariffs, and the language employed is no more extravagant; and yet the railroad companies, when compliance has been undertaken, have found the difficulties dwindling into insignificance. And the sev-

eral express companies which actually filed their tariffs did not, when forwarding them to the Commission, even suggest that any difficulty had been encountered in preparing them.

The arguments from the history of the Act have plausibility. It may be conceded that the evils at which the Act was aimed have not existed to any great extent in the express business. One reason—perhaps the principal reason—for this is that, as each of the several express companies has had a practical monopoly on the lines on which it operates, the inducement to secret rebates and to the unjust discrimination which springs from severe competition has been wanting. It has been easier, also, to make and maintain rates which are proportioned to distance. Water competition, which so seriously affects the ordinary freight traffic of railroads, would scarcely affect at all the traffic for which shippers are willing to pay high rates in order to have great speed. But the complaint of excessive charges upon express traffic has been common, and that of greater charges on shorter hauls is sometimes heard, and if it shall be held that express companies are not controlled by the rules of fairness and equality which the act prescribes, it is easy to see that the mischief against which the Act is aimed may reappear and be enacted with impunity.

It has already been said that no clear line of distinction exists between the express business and some branches of what is exclusively railroad service; and the express business may easily be enlarged at the expense of the other. Those roads which now do their express business through a nominal corporation might hand over to this shadow of their corporate existence the dressed meat or live-stock business, or the fruit transportation, or any other business in respect to which speed was specially important; and they might continue this process of paring off their proper functions as carriers until they should be little more than the owners of lines of road over which other organizations should be the carriers of freight, and on terms by themselves arbitrarily determined.

The Commission after a hearing of all the arguments ad-

vanced by those who appeared for the express companies, is of opinion that the express business, so far as it is done by the railroad companies themselves, whether directly, and by their managing officers, or indirectly, and through nominal corporations created for the purpose, is within the act; and that such companies are under obligations to see that the tariffs are filed, and that the rules of fairness and equality which the act prescribes are observed. Whether the express companies which are independent of the railroads are within the contemplation of the act is more doubtful.

The Commission is of opinion that the question is one which Congress ought to put beyond question by either expressly and by designation including the express companies or by excluding them. The railroad companies that see fit to do their own express business ought not, either as respects principles or methods, to be subjected in the management of such business to any different control or regulation from that which the independent express companies of the country are required to obey. If the latter are not within the contemplation of the Act to regulate commerce, all express business, by whomsoever carried on, should be excluded. Justice to the public, as well as to that business, demands that it be governed throughout the country by rules of general application, and which shall not be dependent on mere forms, or on the will of those who happen to be in the control of the railroads, and therefore have the power to determine by what agencies this important portion of the business of the roads shall be conducted.

Other Carriers.—What is said of the express business is applicable also to the business of furnishing extra accommodations to passengers in sleeping and parlor cars. These accommodations are furnished in some cases by the railroad companies, and in others by outside corporations, which are not supposed to be embraced by the terms of the law. Outside companies are also to some extent engaged in the transportation of live-stock in cars owned by themselves, but transported over the railroads under special arrangements with the railroad companies which supply the motive power. As these last-named companies furnish better accommo-

dations for live-stock, and transport them with less liability to injury and with less shrinkage than is done in the ordinary stock car, it is not improbable that they, like the companies which furnish special accommodations for passengers, may in time build up a large business in respect to which they will not be controlled by any existing legislation.

It is well known also that the transportation of mineral oil is already to a very large extent in tank cars owned by parties who are not carriers subject to regulation under the Act to regulate commerce. A willingness to disregard the rules of equality and justice as between shippers, when it can be made for the interest of the carriers to do so, is as likely to make its appearance in the action of the managers of any one of these outside organizations as in that of the managers of the railroads, for the temptations will be the same, and the same class of persons will be bidding for special privileges and advantages which before the Act was passed prospered so unfairly upon railroad favors. The Act has not changed the nature or the grasping disposition of individuals ; it has only interposed certain restraints which it is reasonable to assume will be evaded if the opportunity shall be presented.

These facts are noted for the purpose of placing the whole subject distinctly before the national legislature. If it is the will of Congress that all transportation of persons and property by rail should come under the same rules of general right and equity, some further designation of the agencies in transportation which shall be controlled by such rules would seem to be indispensable.

THE LONG AND SHORT HAUL CLAUSE OF THE ACT.

Another question presenting itself immediately on the organization of the Commission was that respecting the proper construction of the fourth section of the Act, which, after providing

That it shall be unlawful for any common carrier subject to the provisions of this act to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property, under substantially similar circumstances and conditions, for a shorter than for a

longer distance over the same line, in the same direction, the shorter being included within the longer distance.

proceeds to say—

That, upon application to the Commission appointed under the provisions of this Act, such common carrier may, in special cases, after investigation by the Commission, be authorized to charge less for longer than for shorter distances for the transportation of passengers or property, and the Commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section of this Act.

The provision against charging more for the shorter than for the longer haul under the like circumstances and conditions over the same line and in the same direction, the shorter being included within the longer distance, is one of obvious justice and propriety. Indeed, unless one is familiar with the conditions of railroad traffic in sections of the country where the enactment of this provision is found to have its principal importance, he might not readily understand how it could be claimed that circumstances and conditions could be such as to justify the making of any exceptions to the general rule.

It is a part of the history of the Act that one house of Congress was disposed to make the rule of the fourth section imperative and absolute; and it is likely that in many sections of the country many railroad managers would very willingly have conformed to it, because for the most part they could have done so without loss, and with very little disturbance to general business. But in some other parts of the country the immediate enforcement of an iron-clad rule would have worked changes so radical that many localities in their general interests, many great industries, as well as many railroads, would have found it impossible to conform without suffering very serious injury. In some cases, probably, the injury would have been overbalanced by a greater good; in others it would have been irremediable. To enforce it strictly would have been, in some of its consequences in particular cases, almost like establishing, as to vested interests, a new rule of property.

Difficulty of the Subject.—A study of the conditions under which railroad traffic in certain sections of the country has sprung up is necessary to an understanding,

of the difficulties which surround the subject. The territory bounded by the Ohio and the Potomac on the north and by the Mississippi on the west, presented to the Commission an opportunity, and also an occasion, for such a study. The railroad business of that section has grown to be what it is in sharp competition with water carriers, who not only have had the ocean at their service, but by means of navigable streams were able to penetrate the interior in all directions. The carriers by water were first in the field, and were having a very thriving business while railroads were coming into existence; but when the roads were built the competition between them and the water-craft soon became sharp and close, and at the chief competing points the question speedily came to be, not what the service in transportation was worth, or even what it would cost to the parties performing it, but at what charge for its service the one carrier or the other might obtain the business. In this competition the boat owners had great advantages: the capital invested in their business was much smaller; they were not restricted closely to one line, but could change from one to another as the exigencies of business might require; the cost of the operation was less. But the railroads had an advantage in greater speed, which at some times, and in respect to some freight, was controlling.

In this competition of boat and railroad the rates of transportation which were directly controlled by it, soon reached a point to which the railroads could not possibly have reduced all their tariffs and still maintain a profitable existence. They did not attempt such a reduction, but on the contrary, while reducing their rates at the points of water competition to any figures that should be necessary to enable them to obtain the freights, they kept them up at all other points to such figures as they deemed the service to be worth, or as they could obtain. It often happened, therefore, that the rates for transporting property over the whole length of a road to a terminus on a water highway would not exceed those for the transportation for half the distance only, to a way station not similarly favored with competition. The seeming injustice was excused on the plea of necessity. The rates to the

terminus, it was said, were fixed by the competition, and could not be advanced without abandoning the business to the boats. The greater rates to the local points were no more than was reasonable, and they were not by reason of the low rates to the competitive point made greater than they otherwise would have been. On the contrary, if the rates on the railroad were established on a mileage basis throughout, with no regard to special competitive forces at particular points, the effect in diminishing the volume of business would be so serious that local rates at non-competitive points would necessarily be advanced beyond what they are made when the competitive business can be taken also, even though the competitive business be taken at rates which leave little margin above the actual cost of movement. Such is the common argument advanced in support of the short-haul rates.

But the lower rates on the longer hauls have not been due altogether to water competition; railroad competition has been allowed to have a similar effect in reducing them. But as the railroad tariffs are commonly agreed upon between the parties making them, the necessity which controlled the water competition was not so apparent here, and to some extent the lower rates have been conceded to important towns in order to equalize advantages as between them and other towns which were their rivals, and to which lower rates had been given under a pressure of necessity. But they were given also in many cases as a means of building up a long-haul traffic that could not possibly bear the local rates, and which consequently would not exist at all if rates were established on a mileage basis, or on any basis which, as between the long and short haul traffic, undertook to preserve anything like relative equality.

It would be foreign to the purposes of this report to discuss at this time the question whether in this system of rate-making the evils or the advantages were most numerous and important. Some of the evils are obvious; not the least of which is the impossibility of making it apparent to those who have not considered the subject in all its bearings, that the greater charge for the shorter haul can in any case be just. The first impression necessarily is that it must be ex-

tortionate ; and until that is removed it stands as an impeachment of the fairness and relative equity of railroad rates. But on the other hand it must be conceded that this method of making rates represents the best judgment of experts who have spent many years in solving the problems of railroad transportation ; and its sudden termination without allowing opportunity for business to adapt itself to the change would, to some extent, check the prosperity of many important places, render unprofitable many thriving enterprises, and probably put an end to some long-haul traffic now usefully carried on between distant parts of the country. It is also quite clear that the more powerful corporations of the country, controlling the largest traffic and operating on the chief lines of trade through the most thickly settled districts, can conform to the statutory rule with much more ease and much less apparent danger of loss of income than can the weaker lines, whose business is comparatively light and perhaps admits of no dividends, and the pressure of whose fixed charges imposes a constant struggle to avoid bankruptcy.

If Congress intended this immediate change of system, it was not for the Commission to inquire whether the evils of making it at once would or would not exceed the benefits. The law must stand as the conclusive evidence of its own wisdom, and the authorities charged with enforcing it were not to question but to obey it. With the Commission, therefore, the first question was one of interpretation ; and when it was clearly perceived what Congress intended, the line of duty was plain. The intent should be given effect, not only because it was enacted, but because in the enactment it was determined by the proper authority that the public good required it.

Construction of the Clause.—In coming to a consideration of the fourth section of the Act it was immediately perceived that many different views were taken of it, some of which were settled convictions which were the result of thought and reflection, while others were mere off-hand impressions and deserving of little attention. By some persons it was assumed that the Commission had by the Act been given a gen-

eral authority to suspend altogether the operation of the fourth section, and upon this utterly baseless and unreasonable assumption the Commission was plied with arguments in support of a general suspension. Other views went to the opposite extreme, and while holding that the general rule must be enforced in all cases until the Commission had sanctioned exceptions, would restrict the power to make exceptions to individual shipments made under circumstances and conditions which were special and peculiar. Such a restriction would obviously render the authority to make exceptions of no practical utility.

But among those who had given the subject thought and attention, and whose views for that reason were deserving of consideration, a most important difference of opinion was found to exist regarding the stage at which the intervention of the Commission under the fourth section was to be invoked. By some persons it was believed that a rule was laid down by that section which could not lawfully be departed from until the Commission on investigation had determined that the circumstances and conditions of the longer and of the shorter transportation were so dissimilar as to justify making the greater charge for that which was the shorter, and had prescribed the extent of the permissible exception.

By others the fact was emphasized that the charging or receiving "any greater compensation in the aggregate for the transportation of passengers or of the like kind of property" "for a shorter than for a longer distance over the same line in the same direction, the shorter being included in the longer distance," was only declared by the section to be unlawful when both were "under substantially similar circumstances and conditions;" and they confidently affirmed that the carrier could require no order of relief from the Commission when the circumstances and conditions were in fact dissimilar, since the greater charge was not then unlawful and not forbidden. This view would leave the carrier at liberty to act on its own judgment of the conditions and circumstances in any case, subject to responsibility to the law if the greater charge were made for the shorter transportation

when the circumstances and conditions were not in fact dissimilar, unless authorized to make such greater charge by the relieving order of the Commission.

When the Commission was called upon in the performance of its duty to give an interpretation to this section it was found on comparison of views that the interpretation last above mentioned seemed to all its members to be the one best warranted by the phraseology of the statute. Moreover, when it was considered how vast was the railroad mileage of the country, how numerous were the cases in different sections in which, for divers reasons, the general rule prescribed by the fourth section was then departed from, this interpretation seemed the only one which, in administering the law, would be found practical or workable. Possibly the Commission might therefore have been justified in making immediate announcement of this opinion.

It was not, however, believed to be wise to make such announcement at that time. The construction of a new statute having great remedial purposes in view ought not to be hastily made by the tribunal called upon to act under it. When a question of construction comes before the courts parties interested in taking different views are heard by counsel, and if the case is important the court is likely to have all the considerations which support the several views presented, and will thus be fully informed when it comes to make decision.

The Commission had not had the benefit of discussion by counsel of this most important provision. To delay, before taking any action whatever, until in the ordinary course of affairs a case should arise where the proper construction of the section should be the point in controversy, might be exceedingly injurious to many interests. Under these circumstances it seemed to the Commission that the prudent course, and the course most consistent with the general purposes the act was intended to accomplish, was to take such action as for the time being would disturb as little as possible the general business of the country, and at the same time give ample opportunity for full discussion and consideration of this most important question.

The act to regulate commerce was not passed to injure any interests, but to conserve and protect. It had for its object to regulate a vast business according to the requirements of justice. Its intervention was supposed to be called for by the existence of numerous evils, and the Commission was created to aid in bringing about great and salutary measures of improvement. The business is one that concerns the citizen intimately in all the relations of life, and sudden changes in it, though in the direction of improvement, might in their immediate consequences be more harmful than beneficial. It was much more important to move safely and steadily in the direction of reform than to move hastily, regardless of consequences, and perhaps be compelled to retrace important steps after great and possibly irremediable mischief had been done. The act was not passed for a day or for a year; it had permanent benefits in view and to accomplish these with the least possible disturbance to the immense interests involved seemed an obvious dictate of duty.

Acting upon these views, and in order to give opportunity for full discussion, the Commission, after having made sufficient investigation into the facts of each case to satisfy itself that a *prima facie* case for its intervention existed, made orders for relief under the fourth section, where such relief was believed to be most imperative. These orders were temporary in their terms, and in making them it was announced that sessions would be held in the section of the country to which a majority of these orders related, at which all parties interested in the questions they presented were at liberty to appear and present their views. Whatever view should ultimately be taken of the proper interpretation of the fourth section, this course could result in no serious injury. If the first impression of the Commission should be held to be correct, the orders would only sanction what might have been done without them, but if the opposite view should be taken they would only postpone for a time the strict enforcement of the fourth section, and give opportunity during that period for the business of the country to adapt itself as far as possible to the new requirement.

The considerations which were influential in determining

when these temporary orders should be granted were not more the relief of the carriers from danger of loss than the prevention of threatened disturbance of business interests in certain localities, which by its reflex action seemed liable to embarrass seriously the entire country. When no great or special urgency was shown, connecting threatened injury to important interests with the literal enforcement of the section, or when the only showing made was of the loss of a certain line of traffic to one carrier which nevertheless was adequately served by being given another direction, temporary orders were not made. Fifty-eight petitions were filed for relief from the operation of the fourth section, some of which were joint; ninety-five railroad companies were petitioners; temporary orders were made in twenty cases, by the terms of which forty-three carriers were for a limited period and pending full investigation relieved from the operation of the section as to certain points enumerated in each order, where the charging of less for the longer distance was permitted to be continued for the time being.

The opinion of the Commission upon the applications for relief is herewith given in Appendix A. In the same appendix is given a list of the carriers petitioning and a statement of the action of the Commission on each case.

Modification of Tariffs. —In finally announcing its conclusion, as it did on the petition of the Louisville and Nashville Railroad Company for relief, the Commission called the attention of the several carriers which had obtained orders to the desirability of revising their tariffs and bringing them more nearly into conformity with the general rule of the fourth section. The opinion was expressed that this revision was practicable without serious injury to the interests involved. This suggestion was acted upon by several of the petitioning carriers, and by a still greater number who had not petitioned for relief; and the Commission takes pleasure now in being able to report that in large sections of the country obedience to the general rule of the fourth section is without important exception. While before the passage of the Act few lines operated as competitors for long-haul traffic could be found upon which the practice of the lesser charge for the longer

haul did not exist, on a very large proportion of them all it has now come to an end. This has in some instances been accomplished by raising the rates on through traffic, but in many cases where this was done the practical experiment resulted finally in a general reduction throughout the line. In other instances the lower rates on long-haul traffic were retained and the local rates reduced to the limit thus established. In still other instances a compromise course was pursued, the previous low rates at certain so-called competitive points being raised somewhat, and the local rates at intermediate points reduced sufficiently to be brought within the statutory rule. This last course was pursued upon some of the leading roads in the Southern States as to points to which it was in their power to control the rates made.

The process has been continually going on, and is still in progress. Tariffs are from time to time filed with the Commission showing a reconstruction of the rates in the direction of the rule laid down in the fourth section. The carriers making them sometimes protest that the rates are not voluntarily made, but only because the law so requires, and that they will involve large loss of revenue. The apprehension of loss in cases when the local and non-competitive rates are adjusted to the through rates, is, in some cases, supported by strong probabilities.

The transcontinental roads have not conformed to the general rule of the fourth section. By the managers of those roads it is contended that in view of the competition which they must meet, not only of ocean vessels but of the Canadian railways, it will be absolutely impossible for them to comply with the strict rule of the fourth section without surrendering a very large portion of their through business, and that such surrender will be equally ruinous to their own interest and to many other large interests on the Pacific coast. How far this contention is just the Commission has as yet neither had the occasion nor found the opportunity for judging; but cases now pending in which the rates to interior points are complained of will soon receive attention, and the general question will probably to some extent be found involved.

Neither is it the case that the roads in the States south of the Ohio have come into general conformity with the rule of the fourth section. Some of them have greatly modified their tariffs in that direction; some profess compliance, while some insist that compliance is not possible without ruin. Of these the case of the Louisville and Nashville Railroad Company may be taken as representative. In pending proceedings against that company for a violation of the fourth section it is frankly avowed by the company that its method of making rates has not been changed since the Act was passed, and at the same time it is insisted that any considerable change is impossible. The local rates cannot be reduced, it is said, because they are as low now as can be afforded unless the competitive rates are raised, and to raise the competitive rates would be to abandon the business, which would then go to other carriers. It is further insisted for the company that while it gives, as it is compelled to do, very low rates to competing points, the intermediate stations participate in the benefits, because their rates never exceed the rates to the competitive points with the local rates thence to the intermediate stations added, and therefore every reduction to the competitive point causes a like reduction to the intermediate point also. This, as has been said, is the contention which the company makes in pending cases, and in support of which much evidence has been put in.

Circuitous Routes.—Some of the cases in which the strict rule of the fourth section is not applied are cases in which the longer hauls are made by circuitous routes, and the charges are necessarily made very low in order to meet the competition of more direct lines. The competition by these circuitous routes is in some cases hardly legitimate, and while it continues it constitutes a disturbing element in the general railroad business of the section. It is nevertheless thought by the local communities to be important, and there are probably some weak lines that would find it difficult to maintain a useful existence if not permitted to engage in competition for a business that would naturally fall to other lines. It happens in some of these cases that the lower charges on the longer hauls are only made lower because the points to which

they are made are nearer by direct routes to the common market than the points to which the higher charges are made; and in such cases to compel the circuitous route to conform to the rule of the fourth section strictly would be to compel an abandonment of some portions of its business. If the direct lines to the common market give to the near point the lower rate, the circuitous line has no alternative but to do the same or to give up any attempt at competition.

The Commission has not as yet had occasion to decide a case which involved the construction of the fourth section in its application to traffic by these circuitous routes; the only case in which the question was made having been found, when the facts were examined, not to present it. (1 Interstate Commerce Commission Reports, p. 199).

In some cases the lower rate on the longer line is a combination of rates over several lines; and it has been contended in some quarters that the fourth section only applies to cases in which the carrier who makes the greater charge for the shorter haul controls the line of longer haul, and makes the charge upon that also. The Commission does not take this view, but has decided in the case of the Vermont State Grange against the Boston and Lowell Railroad Co. and others (1 Interstate Commerce Commission Reports, page 158), that where a carrier unites with one or more others in making a rate for long-haul traffic, the rate so made constitutes a measure for the rates on short-haul traffic upon its own lines as much as it would if the long-haul transportation was on its line exclusively.

Effects of Abrogation of Former Practice.—Where the practice of making the greater charge upon the shorter haul has long prevailed, the effect of its abrogation upon some portion of the business of the smaller cities of the country should perhaps be noted. Those cities have generally been in position to handle goods of all kinds, purchasing them at importing, manufacturing, and producing points, and reselling to retail dealers in their more immediate vicinity. The rates of freight have favored these distributing points, and have been so low that goods could be taken to them and sent forward after handling, or even returned for a certain distance over

the same line, at a less aggregate rate of freight than the smaller places could obtain on the same goods from the same initial point. The ability to do this has developed very important business houses, and has largely controlled business methods in some sections of the country, but it no longer exists when the fourth section has been literally applied. The rate from the initial point to the given city—as, for example, from Baltimore or Philadelphia to Danville, Va.—added to the rate from that point to smaller points beyond, will then be more than the through rates from the initial point to the latter places, and at the same time the rate to the given city will be as great or greater than the rates to the intermediate points on the same line; and the natural effect is to depress the wholesale business at all such points and to throw the trade into the hands of metropolitan dealers. This fact is clearly seen in some of the cases now pending before the Commission. There are compensations for all such incidental injuries, and the question involved being one of legislative policy, the Commission deems it sufficient to state the facts as they exist, without comment upon them.

The Commission, on October 20, caused a circular letter to be sent to the various carriers subject to the provisions of the Act throughout the United States, inquiring concerning the practical application of the fourth section in making the tariffs in use upon the lines of each respectively. This circular has been very generally answered, and the replies give full information in respect to the manner in which the provisions of the “long and short haul” clause are now being observed by the carriers. A very large number of railroad companies, lines, and systems, answer unequivocally that there are no points upon their respective lines to or from which interstate rates for passengers or freight are greater than to or from more distant points in the same direction over the same line. Others, slightly misapprehending the inquiry made, state that no such instances exist upon their own roads, but that joint tariffs are made by them to points upon other roads where variations from the rule exist. Still others state the points upon their lines which are exceptionally treated, and give the reasons which are claimed to justify them in the rates made.

The statements and explanations of the different companies so far as they are other than a simple negative reply, present the situation so clearly and directly, from the standpoint of the carriers, and show so distinctly the various circumstances and conditions found in different parts of the country which are claimed by them to affect their traffic to an extent warranting a departure from the letter of the statutory rule, that the Commission has determined to lay the entire series before Congress as an appendix to this report. This appendix, which is marked E, contains the following documents :—

I. Circular letter to carriers of October 20, 1887.

II. List of carriers which reply that they do not make interstate rates where a greater sum is charged for a shorter than for a longer distance in the same direction over the same line, to or from any point on their respective roads.

III. Letters and documents from carriers which accepted the invitation of the Commission to make a statement concerning the circumstances and conditions of traffic which they claimed made their case exceptional.

Reviewing railway operations during the period which has elapsed since the Act took effect, the Commission feels warranted in saying that while less has been done in the direction of bringing the freight tariffs into conformity with the general rule prescribed by the fourth section than some persons perhaps expected, there has nevertheless been a gratifying advance in that direction, and there is every reason to believe that this will continue. That substantial benefits will flow from making the rule as general as shall be found practicable cannot be doubted; and even when the circumstances and conditions of long and short-haul traffic are dissimilar, the desirability of avoiding any considerable disparity in the charges is great and obvious. So far, therefore, and so fast as business prudence and a proper regard to the interests of the communities which would be disturbed and injured by precipitate changes will admit of its being done, such railroad companies as do not now conform to the statutory rule should make their rates on these two classes of traffic more obviously just and more proportional than they have hitherto been or now are.

THE FILING AND PUBLICATION OF TARIFFS.

In addition to the publication of the freight and passenger tariffs, each carrier is also required to file with the Commission copies of its schedules of rates, fares, and charges, and promptly to notify the Commission of all changes made in the same; also to file with the Commission copies of all contracts, agreements, or arrangements with other carriers in relation to any traffic affected by the provisions of the Act to which it may be a party. And in cases where passengers and freight pass over continuous lines or routes operated by more than one common carrier, and the several common carriers operating such lines or routes establish joint tariffs of rates, or fares, or charges for such continuous lines or routes, copies of the same are in like manner required to be filed, and the Commission is empowered to require their publication in so far as it shall be found practicable, and to determine the measure of publicity to be given to such rates, fares, and charges. With these provisions there has been general, but not in all cases satisfactory, compliance on the part of the carriers; and the Commission, acting under the discretionary authority conferred upon it to require the publication of joint tariffs, has made order for their publication in all cases where the joint tariff is competitive to that which is taken by a single line between the same points; the publication under such circumstances being important to the interests of fair and open competition.

But though the carriers make and file their tariffs as required by the Act, there is no general uniformity to the tariffs or to the classifications, either in form or in general method of preparation. This is unfortunate for several reasons, but especially because the public, who have to deal with many carriers, are likely to be confused between the different methods of giving information, and possibly to be misled in some cases. The difficulty of making use of them for the purposes of the Commission is also greatly enhanced by the want of uniformity, and the Commission would be very glad to correct it if that were possible. The force of assistants which the appropriation made by the Act enabled the Com-

mission to engage is so small that any steps in this direction have up to this time been quite out of the question. Some idea of the labor devolved upon this clerical force may be formed when it is known that as near as can now be estimated one hundred and ten thousand books, papers, and documents, showing rates, fares, and charges for transportation, and contracts, agreements, or arrangements between carriers in relation to interstate traffic, have been filed in the office of the Commission, all of which required appropriate classification and systematic arrangement. It has been quite impossible to do more with these than to acknowledge the receipt, classify, and index them, and put them in order for reference. The organization of a general system upon which they might most usefully be made has not been attempted; nor even any systematic investigation of their contents for the purpose of observing to what extent the provisions of the Act to regulate commerce is complied with in their preparation.

This latter duty seems to be clearly contemplated by the Act. The Commission has felt it to be its duty not to exceed in its expenditures the appropriation made, unless compelled by a necessity that should be plainly imperative; and steps, however desirable, that required to give them effect, more clerical force than the appropriation would enable it to secure have therefore been postponed. Should it be within the power of the Commission at any time hereafter to deal with the subject effectively, it will endeavor to do so.

It is within the knowledge of the Commission that some carriers have been advised by their counsel that the prohibition in the Act against an increase of rates except on ten days' notification does not apply to joint rates. The Commission does not admit this advice to be sound; but in case the Act should be amended, it is believed the prohibition should in clear terms be made to extend to joint rates.

GENERAL SUPERVISION OF THE CARRIERS SUBJECT TO THE ACT.

It is provided in the twelfth section of the Act—

That the Commission hereby created shall have authority to inquire into the management of the business of all common carriers subject to the pro-

visions of this act, and shall keep itself informed as to the manner and method in which the same is conducted, and shall have the right to obtain from such common carriers full and complete information necessary to enable the Commission to perform the duties and carry out the objects for which it was created; and for the purposes of this act the Commission shall have power to require the attendance and testimony of witnesses, and the production of all books, papers, tariffs, contracts, agreements, and documents relating to any matter under investigation, and to that end invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of books, papers, and documents under the provisions of this section.

This is a very important provision, and the Commission will no doubt have frequent occasion to take action under it. It will not hesitate to do so in any case in which a mischief of public importance is thought to exist, and which is not likely to be brought to its attention on complaint of a private prosecutor. There is every reason to believe, however, that some of the most serious evils which were notorious in the railway service before the passage of the Act, and were in the legislative mind as reasons for its enactment, have now almost ceased to exist. One of these was the giving of special and secret rebates. These were exceedingly common before the Act, and constituted one of the readiest means of making unjust discrimination. No provision in the Act to regulate commerce is more important than that which forbids them. But among all the complaints made to the Commission not one has charged a specific act in violation of this provision, and where a disregard of it has been suggested it has been by way of general charge and as an expression of suspicion only.

In the litigated cases which have come before the Commission involving an examination into railroad practices at important centers, there has been entire agreement in the proofs that special rates to individuals and secret rebates were no longer made; a single exceptional instance only has come out in the proofs. Their condemnation by the law and the provision made for their detection and punishment have brought about this result. Further evidence in the same direction is furnished by the complaints of those who formerly had them that the law injuriously affects their business; but these complaints, which are aimed at the justice and equity

of the law, the public may bear with equanimity, satisfied that in this particular at least substantial benefit has come from its enactment.

Complaints of unjust discrimination and the giving of undue and unreasonable preferences by the open rates are still frequent, and it is not to be denied that in the existing tariffs there are many rates which, as compared with others made by the same carriers, seem to be unfair and oppressive. But even as regards this species of injustice the good effects of the law are manifest. For whereas formerly the carriers made discriminations at pleasure, and gave preferences for which their own interest or convenience was deemed sufficient reason, the discriminations or preferences which are now complained of are such as the carriers understand they may be called upon to defend, and they are aware that the defense, to be successful, must be based on grounds of substantial justice, or at least on grounds not palpably untenable. This necessity for defending the discriminations made may be expected to reduce very considerably their number, and has already done much toward bringing about more just proportions in the classification and rating of property transported.

In the performance of its duty of supervision, the Commission has found it necessary to conduct a very extended and voluminous correspondence, which could not be presented in this place even in abstracts. A few letters from the Commission which laid down rules, or were of more than individual importance, are, however, given in an appendix hereto marked C. In connection with these letters, attention is called to the decision made by the Commission in the case of *The Vermont State Grange v. The Boston & Lowell Railroad Company, et. al.*, that the railroads who unite in fast freight lines are responsible for their rates, and bound to see that the tariffs are properly filed.

COMPLAINTS TO AND ADJUDICATIONS BY THE COMMISSION.

The ninth section of the Act provides that "any person or persons claiming to be damaged by any common carrier subject to the provisions of this Act, may either make com-

plaint to the Commission, or may bring suit in his or her own behalf for the recovery of the damages " in a Federal Court. The thirteenth section is :

That any person, firm, corporation, or association, or any mercantile, agricultural, or manufacturing society, or any body-politic, or municipal organization complaining of anything done or omitted to be done by any common carrier subject to the provisions of this act, in contravention of the provisions thereof, may apply to said Commission by petition, which shall briefly state the facts ; whereupon a statement of the charges thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint or to answer the same in writing within a reasonable time, to be specified by the Commission. If such common carrier, within the time specified, shall make reparation for the injury alleged to have been done, said carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper.

Said Commission shall in like manner investigate any complaint forwarded by the railroad commissioner or railroad commission of any State or Territory, at the request of such commissioner or commission, and may institute any inquiry on its own motion in the same manner and to the same effect as though complaint had been made.

No complaint shall at any time be dismissed because of the absence of direct damage to the complainant.

The complaints made to the Commission have been very numerous, and in many cases the complainants have appeared to suppose that the Commission could interpose and correct at once an alleged evil on an *ex parte* statement of its existence. In other cases the statement of facts has been so defective that no opinion could be formed whether or not a real grievance existed. In no case has the Commission declined to give attention to a complaint because of its being informal or imperfectly presented, but when not in shape for its action, if the facts indicated a probable grievance, it has opened correspondence with the carrier with a view to redress. In the majority of cases the correspondence has resulted in satisfactory arrangement. Either the complainant has been found to be mistaken in his facts, or if wronged it has been through the carelessness or mistake of an agent which the carrier readily corrected, or if the facts presented a case of difference of opinion, the parties, when brought

into communication, succeeded in finding some basis for settlement without further intervention. This method of disposing of complaints is believed by the Commission to be more useful than any other, because its tendency is towards the establishment of desirable relations between the carriers and those who must be their customers; but when such a disposition of a case proves to be impracticable, the complainant, if he desires it, is given the necessary directions for putting his complaint in form for an adjudication.

It is provided by the fourteenth section of the Act—

That whenever an investigation shall be made by said Commission, it shall be its duty to make a report in writing in respect thereto, which shall include the findings of fact upon which the conclusions of the Commission are based, together with its recommendation as to what reparation, if any, should be made by the common carrier to any party or parties who may be found to have been injured; and such findings so made shall thereafter, in all judicial proceedings, be deemed *prima facie* evidence as to each and every fact found.

And by the fifteenth—

That if in any case in which an investigation shall be made by said Commission it shall be made to appear to the satisfaction of the Commission, either by the testimony of witnesses or other evidence, that anything has been done or omitted to be done in violation of the provisions of this act, or of any law cognizable by said Commission, by any common carrier, or that any injury or damage has been sustained by the party or parties complaining, or by other parties aggrieved in consequence of any such violation, it shall be the duty of the Commission to forthwith cause a copy of its report in respect thereto to be delivered to such common carrier, together with a notice to said common carrier to cease and desist from such violation, or to make reparation for the injury so found to have been done, or both, within a reasonable time, to be specified by the Commission; and if, within the time specified, it shall be made to appear to the Commission that such common carrier has ceased from such violation of law, and has made reparation for the injury found to have been done, in compliance with the report and notice of the Commission, or to the satisfaction of the party complaining, a statement to that effect shall be entered of record by the Commission, and the said common carrier shall thereupon be relieved from further liability or penalty for such particular violation of law.

Reparation for wrongs.—In none of the cases so far decided by the Commission has it felt called upon to order reparation to be made for past injury. Most of the cases were such as to present no case for reparation—they looked only to the

establishment of a rule for the future. Some complaints, however, were evidently made in the expectation that the Commission might proceed to give damages upon a grievance that would support an action on the common-law side of the Federal court. The Commission, when such complaints have been brought to a hearing, has not discovered in the statute a purpose to confer upon it the general power to award damages in the cases of which it may take cognizance. The failure to provide in terms for a judgment and execution is strong negative testimony against such a purpose; but what is perhaps more conclusive is that the Act must be so construed as to harmonize with the seventh amendment to the Federal Constitution, which preserves the right of trial by jury in common-law suits.

It is believed to be unquestionable that parties can not be deprived of this right through conferring authority to award reparation upon a tribunal that sits without a jury as assistant; and that therefore any determination that reparation should be made, in a case in which a suit at law might have been maintained, can not be made absolutely binding and enforceable against the defendant in the form of a judgment; but that under the statute it will put the defendant to election, either to satisfy the complainant, in which case he will be relieved from further liability or penalty, or, on the other hand, to take the risks of proceedings in a Federal court to recover damages or penalty, or both, in which case the finding of the Commission would be *prima facie* evidence of the facts recited in it.

Abstracts of the decisions made by the Commission in the cases litigated before it, and which up to this time it has been enabled to decide, are given in an appendix hereto, marked B. A brief statement is also made of the proceedings in all the cases begun by formal complaint, whether already disposed of or still pending.

In every case in which the Commission made an order against the carrier complained of, the carrier has filed notice of its compliance.

In the course of the hearings before the Commission a great body of evidence has been taken, which will remain on

file in the office for reference or for any future use for which there may be occasion.

PROCEEDINGS BEFORE THE COMMISSION.

It has been deemed exceedingly desirable that proceedings before the Commission on complaints against carriers should be made as informal as should be consistent with order and regularity, and that dilatory action of every nature should be discouraged. The rules of procedure, therefore, which were early adopted and put in force made no other requirement for a complaint than that it should be in the form of a verified petition and set forth the facts which constitute the grievance complained of. When such a statement has appeared, however informally made, the petition has been accepted and an answer called for. Demurrers or motions to dismiss have not been favored, unless the case was such that the whole merits would thereby be presented; but the defendant has been expected to disclose its defense by answer, so that one hearing may be sufficient for the final disposition of the case.

By this method of procedure technicalities are discarded, the complaints and the answers to them are treated as presenting business controversies with the parties, if they elect so to do, can manage for themselves. This they may do without being placed at disadvantage by the want of legal learning, unless the case is such as to depend rather upon the law than upon disputed questions of fact, which many of them do not. When parties have managed their own cases the taking of testimony has been somewhat informal also, and the Commission has given its aid in the examination of the witnesses produced, in order that the whole truth bearing on the matter in controversy might as far as possible be brought out and made plain. It is a pleasure to note that in this informal mode of procedure the parties have in general most heartily co-operated, and that they have been very liberal in agreeing upon the facts when it was practicable to do so, thereby materially shortening the hearings and making them assume more the form of amicable contentions.

A copy of the rules of procedure adopted by the Commis-

sion under the seventeenth section of the Act is hereto appended, marked D.

EXPENSE OF HEARINGS.

The Act provides for compulsory process to bring witnesses before the Commission, and that when summoned they shall be paid for their attendance. It requires the principal office of the Commission to be at the national capital, and apparently contemplates that its sittings shall in general be there held. It provides, however, in the nineteenth section that—

Whenever the convenience of the public or of the parties may be promoted or delay or expense prevented thereby, the Commission may hold special sessions in any part of the United States. It may, by one or more of the Commissioners, prosecute any inquiry necessary to its duties in any part of the United States, into any matter or question of fact pertaining to the business of any common carrier subject to the provisions of this act.

The Commission understands that witnesses produced by parties to controversies are to be paid by the parties producing them. This in some cases, where they must come long distances, is a great burden, especially in view of the fact that the Commission is not given authority to tax costs or even to impose the costs of the hearing upon the defeated party; and the Commission has endeavored to obviate it, first by inducing the parties, as far as possible, to stipulate the facts, and next by providing for the taking of the testimony by deposition, after the manner in which it is taken in the Federal courts. Where, however, a great number of witnesses are to be examined, it has been deemed advisable to hold the sessions near where the transactions which are to be inquired into have taken place, not only because this course is least expensive to the parties, but because in that way the facts are more likely to be completely brought out.

In some cases this course is almost a necessity. The nature of the questions involved is such that they concern large sections of the country quite as much as they do the parties complainant and defendant, and the case ought to be so conducted that any citizen whose interest may be affected can make his views known. A complainant is often only a repre-

sentative of many interests or of a considerable district of country, but he may be a self-chosen representative, and those for whom a decision of his case will constitute a precedent ought not to be concluded without a hearing.

On the other hand, a railroad company may be rather a nominal than a real defendant; the rate, the classification, or the practice complained of may concern some class of its customers who approve of and defend it more than it does the railroad company itself, and the company might be entirely willing to make the change demanded but for the fact that its doing so would bring forward a new class of complainants. Where thus the real controversy is between different interests or different classes of the carrier's customers, the propriety of giving to both the real parties a hearing is obvious, but to make this the most useful and satisfactory it may be necessary to go for the purpose to the part of the country that is especially concerned in the controversy.

There are some questions also which from their nature are such that they can be best investigated where the business they concern is, or where the transactions have taken place out of which they arise. Impressed with this belief the Commission has held sittings in several Southern States, and also in Vermont, Minnesota, and Illinois, and some of the cases now pending might no doubt best be heard at still more distant points, but the appropriation at the service of the Commission has not warranted incurring the necessary expenditures. It seems very certain, however, that the best results can not be attained through sessions held altogether at the national capital.

ANNUAL REPORTS FROM CARRIERS.

The twentieth section of the Act provides—

That the Commission is hereby authorized to require annual reports from all common carriers subject to the provisions of this act, to fix the time and prescribe the manner in which such reports shall be made, and to require from such carriers specific answers to all questions upon which the Commission may need information. Such annual reports shall show in detail the amount of capital stock issued, the amounts paid therefor, and the manner of payment for the same: the dividends paid, the surplus fund, if any, and the number of stockholders: the funded and floating debts and the interest paid thereon; the cost and value of the carrier's property, franchises and

equipment; the number of employees and the salaries paid each class; the amounts expended for improvements each year, how expended, and the character of such improvements; the earnings and receipts from each branch of business and from all sources; the operating and other expenses; the balance of profit and loss, and a complete exhibit of the financial operations of the carriers each year, including an annual balance sheet. Such reports shall also contain such information in relation to rates or regulations concerning fares, or freights, or agreements, arrangements, or contracts with other common carriers, as the Commission may require; and the said Commission may, within its discretion, for the purpose of enabling it better to carry out the purposes of this act, prescribe (if in the opinion of the Commission it is practicable to prescribe such uniformity and methods of keeping accounts) a period of time within which all common carriers subject to the provisions of this act shall have, as near as may be, a uniform system of accounts, and the manner in which such accounts shall be kept.

In deciding upon the form and requisites of this report, so far as it was in the discretion of the Commission to do so, three points have been had especially in view: First, to make it as concise as possible consistent with the information to be furnished; second, to bring it as nearly as possible into conformity with the best forms now required in the reports called for by State laws or State commissions; third, to have the report made as late in the year as possible, and still leave time for tabulating and condensing the information furnished in the annual report to be made by the Commission. The date finally fixed upon as that to which the reports of carriers should relate is June 30, which is now the date prescribed for like reports in a number of the States; and it is hoped that without much delay uniformity may be brought about in the reports required under both Federal and State laws, so that all may relate to the same time and involve no different methods of book-keeping for their preparation.

In deciding upon a form the Commission has invited and been aided by suggestions from State railroad commissions, and also from auditors of railroad companies.

CLASSIFICATION OF PASSENGERS AND FREIGHT.

Classification of Freight.—A number of the complaints made against railway companies have related to the classification of freight. Some of these have sprung from the fact that classifications are not alike in different sections of the

country, and parties who have shipped freight under one classification into a section where a different classification prevails have found the charges against them not the same as they had reason to expect. The ground of others has been that the classification in its effect upon rates worked an unjust discrimination between shippers or between different classes of freights.

It is greatly to be regretted that the same classification is not adopted by the carriers by rail in all sections of the country. The desirability of uniformity is so great, that the suggestion is frequently heard that national legislation should provide for and compel it. If such legislation should be adopted it would be necessary to empower some tribunal to make the classification, and the difficulties which would attend the making would be very great. Relative rates would be involved in it, for classification is the foundation of all rate-making. It was very early in the history of railroads perceived that if these agencies of commerce were to accomplish the greatest practicable good, the charges for the transportation of different articles of freight could not be apportioned among such articles by reference to the cost of transporting them severally; for this, if the apportionment of cost were possible, would restrict within very narrow limits the commerce in articles whose bulk or weight was large as compared with their value.

On the system of apportioning the charges strictly to the cost, some kinds of commerce which have been very useful to the country, and have tended greatly to bring its different sections into more intimate business and social relations, could never have grown to any considerable magnitude, and in some cases could not have existed at all, for the simple reason that the value at the place of delivery would not equal the purchase price with the transportation added. The traffic would thus be precluded, because the charge for carriage would be greater than it could bear. On the other hand, the rates for the carriage of articles which within small bulk or weight concentrate great value would on that system of making them be absurdly low; low when compared to the value of the articles, and perhaps not less so when

the comparison was with the value of the services in transporting them.

It was, therefore, seen not to be unjust to apportion the whole cost of service among all the articles transported, upon a basis that should consider the relative value of the service more than the relative cost of carriage. Such method of apportionment would be best for the country, because it would enlarge commerce and extend communication; it would be best for the railroads, because it would build up a large business, and it would not be unjust to property owners, who would thus be made to pay in some proportion to benefit received. Such a system of rate-making would in principle approximate taxation; the value of the article carried being the most important element in determining what shall be paid upon it.

Accordingly, and for convenience and certainty in imposing charges, freight is classified; that which comes in one class being charged a higher proportional rate than that which is placed in another. But other considerations besides value must also come in when classification is to be made. Some articles are perishable, some are easily broken, some involve other special risks in carriage, some are bulky, some specially difficult to handle, and so on. All these are considerations which may justly affect rates, and therefore may be taken into account in classification. But still others have been found potent. Every section of the country has its peculiar products which it desires to market as widely as possible, and is not unwilling that classification should be made use of by the railroads which serve it as a means of favoring and thus extending the trade in local productions; favoring them by giving them low classification and thus low rates, and discriminating against those of other sections through a classification which rated them more highly.

It has been in the power of every railroad to have a classification of its own; but the necessities of an interchange of business have brought about agreements, and the railroad associations have been given the authority to make classifications for all their members. Their labors in this direction have been extremely important and useful; they

have been steadily reducing the number of different classifications in the country, and steadily approaching a condition of things in which there will be one only. But in these associations, when in session for the making of rates, each railroad official has, to some extent, had the district which was served by his road behind him ; he has felt the pressure of the interests there, and contended for them as against the interests in classification represented by others, not only because it was desirable that the road should favor the policy its patrons favored, but also because the same policy was likely to be beneficial to both.

The result necessarily is that a classification made by a railroad association represents a series of compromises, to which not only the railroads are parties, but in a certain sense business interests and sections of country also ; these in many cases being admitted by their representatives to the consultations upon a subject so vitally concerning their interests, and allowed to present their views. This contention of interests still continues to go on in the meetings and conferences, but with a steady tendency in the direction of one uniform classification, and there is reason to hope that without much further delay all classifications will be brought into harmony. If any other tribunal were to be given the authority to make classification, it must, if it would exercise its power wisely, proceed in much the same way ; it must act deliberately, give all interests an opportunity to be heard, take into account all the considerations which ought to bear upon it ; cost of service, interest of sections, equity as between industries and between classes of persons, and so on indefinitely.

Whether, therefore, the steady tendency in the direction of one uniform classification would be hastened by conferring the power to make one on a national commission is not entirely certain. The work if taken up anew would be one requiring much time for its proper performance ; it would involve a careful consideration of the interests peculiar to different sections of the country, and a close study of the conditions of railroad service as they bear upon such interests. But these conditions change from month to month ;

the classification can not be permanently the same, but must be subject to modification on the same grounds on which it was originally made; the appeals for modification would be as numerous as they would be perplexing, because of the diversity of reasons on which they would be grounded. Under the law as it now is the Commission has appellate powers to correct any unjust classification, and it will keep in view the desirability of general uniformity and do what it properly can to bring about that result.

Classification of Passengers.—The classification of passengers has to some extent been a subject of complaint to the Commission. Some carriers as a rule have but one rate of passenger transportation, and but one class of passengers, except as they may be carriers of emigrants in considerable bodies, and they then have emigrant rates which are lower than those given to other persons, and the emigrants are either given less desirable cars attached to the regular trains, or are sent on trains by themselves. Other carriers make first and second class rates by the same train, the difference in charge having some regard to difference in the carriages which are allotted to the classes respectively. In some sections colored persons are required to take separate cars, though charged the same rates as others. The carriers making this requirement assume to give to colored persons accommodations equal to those given to white people, and are required by law in some States to do so; but complaint is made that this is not always done.

Then, on all roads of any considerable length, parlor and sleeping cars are run, which in most cases are owned by outside corporations, and a special charge made by the owners for seats or berths in them. The palace and sleeping car corporations, like the express companies, as has already been said, do not understand that they come within the contemplation of the Act, so as to be subject to its provisions; but the persons accommodated by them must also have tickets for passage from the railroad companies, and as to those it is not doubted that the same rules of uniformity and impartiality apply as in other cases.

Previous to the passage of the Act it was customary on

many of the roads of the country to give reduced rates to the class of persons known as "commercial travelers," but this was made illegal by the provisions in the Act against unjust discrimination (1 Interstate Commerce Commission Reports, p. 8.) It was also common in some quarters to give special rates to land lookers, explorers, or settlers, who were supposed to be looking for or establishing new homes in a section where their purchase, settlement, or improvement would benefit the carrier giving them, but this also is held to be now forbidden (1 Interstate Commerce Commission Reports, p. 208.) The opinion of the Commission as declared in these cases is that, under the law, it is no longer competent for the carrier to discriminate among passengers enjoying the same accommodations, by means of any special classification dependent upon occupation or other condition or circumstance of a personal nature, except as the law itself, by the twenty-second section, has in terms authorized it.

VOLUNTARY ASSOCIATION OF RAILROAD MANAGERS.

Nearly every railroad in its origin has been independent of all others, and in the early history of such roads they were commonly provided for as local conveniences, with no provision of the great highways of trade and communication which they have since become. It was in many cases thought to be important that a road should be kept as distinct in its business from all others as possible, and at their termini in some instances they were not allowed to have the same freight or passenger stations with other roads, lest the local draymen and hackmen should be deprived of a profitable employment.

When the great possibilities of railroad service came to be better understood these primitive notions of local benefits gave way before a more enlightened public sentiment, and the fact was recognized that the public interest would be best subserved by making the connection between the roads as close as possible, in order that the commerce between different sections and localities might go on steadily and uninterruptedly. The railroad companies perceived also that their interests lay in the same direction, and they not only

entered into close business relations with each other, but in many cases formed consolidations. The tendency to consolidation excited public distrust, being looked upon as a device to avoid competition and to deprive the public of the benefits of having more than one line of transportation for the same traffic, which, in some cases, had been the chief inducement to the building of particular lines. Laws were therefore passed forbidding consolidation; but these were avoided by taking leases of roads, or by acquiring a controlling interest in the stock, and then entering into permanent running arrangements.

But it sometimes happened that the managers of a road deemed it for its interest to work in complete independence, and while making profit out of the local conveniences it supplied, it found means to add to these a further profit from the inconvenience it could cause to the business of other roads. It therefore discriminated between other roads; it hindered the business of one while it furnished all possible facilities to the business of another; and this it was enabled to do because it was not compellable by law to make joint running arrangements or joint tariffs for business with other roads. Such action was likely to incommode the public quite as much as it did the road which was discriminated against, but it seemed impossible to deal with it adequately by law. To make railroads of the greatest possible service to the country contract relations would be essential, because there would need to be joint tariffs, joint running arrangements, an interchange of cars, and a giving of credit to a large extent, some of which were obviously beyond the reach of compulsory legislation, and even if they were not, could be best settled and all the incidents and qualifications fixed by the voluntary action of the parties in control of the roads respectively.

Agreement upon these and kindred matters became therefore a settled policy, and short independent lines of road seemed to lose their identity and to become parts of great trunk lines, and associations were formed which embraced all the managers of roads in a State or section of the country. To these associations were remitted many questions of com-

mon interest, including such as are above referred to. Classification was also confided to such associations, it being evident that differences in classification were serious obstacles to a harmonious and satisfactory interchange of traffic. But what perhaps more than anything else influenced the formation of such associations and the conferring upon them of large authority, was the liability which was constantly imminent, that destructive wars of rates would spring up between competing roads to the serious injury of the parties and the general disturbance of business.

Pooling.—Accordingly, one of the chief functions of such associations has been the fixing of rates and the devising of means whereby their several members can be compelled or induced to observe the rates when fixed. And in devising these means the chief difficulty was encountered. Agreements upon rates were voluntary arrangements which could be departed from at pleasure, and if they had behind them no sanction, they were not likely to stand in the way of a war of rates when the provocation to one seemed sufficient. For this reason the scheme of pooling freights or the earnings from traffic was devised and put in force through the agency of these associations, as a means whereby steadiness in rates might be maintained. The scheme was one which was made use of in other countries and had been found of service to the roads.

The pooling system was looked upon with distrust by the public, mainly because it seemed to be a scheme whereby competition between the roads could be obviated, and rates for railroad service put up or kept up to unreasonable figures. But if railroad managers supposed that by this scheme they were to stop competition among themselves, the result has not answered their expectations. The competition has still gone on; each road striving to obtain as large a share of the business as possible, and no agreement among them could altogether prevent a yielding to the pressure of shippers for lower rates.

In 1877, when the pooling system was put in force by the Trunk Line Association, the rates charged on the first, second, third, and fourth classes of freights from New York to

Chicago were, respectively 100, 75, 60, and 45 cents a hundred pounds. They are now 75, 65, 50, and 35 cents, but the classification as to many articles has in the meantime been reduced, so that the actual reduction is greater than these figures would indicate. Rates from Chicago to New York are also proportionately less. A similar result has been apparent elsewhere. The pooling system has done much to maintain steadiness in rates, but the managers have not been able by means of it to keep rates up to former standards. It has done something, however, to check a prevailing tendency to consolidation. The motives to consolidation are diminished by any contrivance which removes obstacles to the interchange of business and increases the facilities and conveniences for uninterrupted commercial intercourse.

The Act to regulate commerce, expressing in that particular the desire of Congress to preserve to the people the benefits of competition, contains the following provision :—

That it shall be unlawful for any common carrier subject to the provisions of this act to enter into any contract, agreement, or combination, with any other common carrier or carriers for the pooling of freights of different and competing railroads, or to divide between them the aggregate or net proceeds of the earnings of such railroads, or any portion thereof ; and in any case of an agreement for the pooling of freights as aforesaid, each day of its continuance shall be deemed a separate offense.

But while thus prohibiting pooling, the Act undertakes to give by other provisions some of the securities which railway managers had hoped might be realized from that device. The seventh section provides—

That it shall be unlawful for any common carrier subject to the provisions of this act to enter into any combination, contract, or agreement, express or implied, to prevent, by change of time schedule, carriage in different cars, or by other means or devices, the carriage of freights from being continuous from the place of shipment to the place of destination, unless such break, stoppage, or interruption was made in good faith for some necessary purpose, and without any intent to avoid or unnecessarily interrupt such continuous carriage or to evade any of the provisions of this act.

And in the third is declared that

Every common carrier subject to the provisions of this act shall, according to their respective powers, afford all reasonable, proper, and equal facil-

ities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers and property to and from their several lines and those connecting therewith, and shall not discriminate in their rates and charges between such connecting lines; but this act shall not be construed as requiring any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business.

The fourth section of the Act has also important possibilities as a restraint upon reckless rate wars. The reductions when such wars are in progress have generally been made chiefly at competitive points a considerable distance apart, and when a reduction of rates at such points involves also a reduction to or from a great number of intermediate points, a resort to a cutting of rates that goes beyond the warrant of legitimate competition becomes unlikely in proportion as it would be injurious to the party inaugurating it.

Other objects of association.—The pooling of freights and of railroad earnings, so far as the Commission has knowledge or information on the subject, came to an end when the Act took effect. But as pooling was only one of several purposes had in view in forming railroad associations, the leading associations have not been dissolved, but have been continued in existence for other objects. Among these objects are the making of regulations for uninterrupted and harmonious railroad communication and exchange of traffic within the territory embraced by their workings. Some regulations in addition to those made by the law are almost if not altogether indispensable. Thus, while the seventh section of the Act forbids the carriers preventing shipments from being continuous by the device of changing time schedules, carriage in different cars, etc., it has not undertaken to provide for the making of such time schedules as would facilitate the continuous shipment, or to prescribe rules for the loading and movement of cars for that purpose. However desirable this might have been if it were practicable to make rules which, while general in their nature, should be sufficiently definite for enforcement as laws, it was doubtless perceived by Congress that these and many other matters of detail, though they might be of high importance, could not be wisely and effectively dealt with by general legislation, but that such

legislation must chiefly be restricted to provisions for regulation and to prevent abuse.

Moreover, these matters of detail, to a considerable extent, involve the element of contract, and also of credit, when one company becomes the agent for another in the sale of tickets and the collection of freight moneys; and they then require the assenting minds of parties; and the number of parties whose minds are to be brought into accord being commonly very considerable, an association of officers or agents is made the means of bringing about the desired unity of action, and is also made a common arbiter, to prevent frequent and serious disturbances.

Classification, also, as has been said, is not by the Act taken out of the hands of the carriers, though a certain power of supervision is vested in the Commission; and classification is not only best made by joint action, but if it were not so made and the methods of the roads thereby brought into harmony, it would probably become indispensable, however undesirable it might otherwise be, for the law to undertake to provide for it. Moreover, when classification is made and put into effect it becomes necessary to make provision for inspection or some sort of supervision of its application, in order to prevent its being employed as a device for giving preferences as between shippers. A fraudulent classification, through connivance of the agent in making out deceptive shipping bills, has often been resorted to for this purpose; and as the fraud affects the competing carriers as well as the shippers who are discriminated against by means of the cheat, the carriers and the public alike are interested in such a supervision of the work of all the roads as will be likely to detect the fraud. Self-interest on the part of the carriers will impel to this supervision, and it is most generally done through some common agency. If it shall be fairly done as between the carriers themselves, it will tend to the protection of the public; and the benefits will be on the same line with those the Act undertakes to establish or provide for.

REASONABLE CHARGES.

Of the duties devolved upon the Commission by the Act

to regulate commerce, none is more perplexing and difficult than that of passing upon complaints made of rates as being unreasonable. The question of the reasonableness of rates involves so many considerations and is affected by so many circumstances and conditions which may at first blush seem foreign, that it is quite impossible to deal with it on purely mathematical principles, or on any principles whatever, without a consciousness that no conclusion which may be reached can by demonstration be shown to be absolutely correct. Some of the difficulties in the way have been indicated in what has been said on classification; and it has been shown that to take each class of freight by itself and measure the reasonableness of charges by reference to the cost of transporting that particular class, though it might seem abstractly just, would neither be practicable for the carriers nor consistent with the public interest.

Rule of Policy.—The public interest is best served when the rates are so apportioned as to encourage the largest practicable exchange of products between different sections of our country and with foreign countries; and this can only be done by making value an important consideration, and by placing upon the higher classes of freight some share of the burden that on a relatively equal apportionment, if service alone were considered, would fall upon those of less value. With this method of arranging tariffs little fault is found, and perhaps none at all by persons who consider the subject from the standpoint of public interest. Indeed, in the complaints thus far made to the Commission little fault has been found with the principles on which tariffs for the transportation of freights are professedly arranged, while applications of those principles in particular cases have been complained of frequently and very earnestly.

Occasions of Complaint.—Among the reasons most frequently operating to cause complaints of rates may be mentioned:

The want of steadiness in rates.

The disproportion between the charges for long and those for short distances.

The great disparity between the charges made for trans-

portation by roads differently circumstanced as to advantages.

The extremely low rates which are compelled by competition in some cases, and which may make rates which are not unreasonable seem, on comparison, extremely high.

Some others will be mentioned further on.

Unsteadiness in Rates.—The want of steadiness in rates is commonly the fault of railroad managers, and may come from want of care in arranging their schedules, or from want of business foresight. But more often perhaps it grows out of disagreements between competing companies which when they become serious may result in wars of rates between them. Wars of rates, when mutual injury is the chief purpose in view, as is sometimes the case, are not only mischievous in their immediate effects upon the parties to them, and upon the business community whose calculations and plans must for a time be disturbed, but they have a permanently injurious influence upon the railroad service because of their effect upon the public mind. When railroad companies determine for themselves what their rates shall be, it is not unnatural for the public to infer that the lowest rates charged at any time are not below what can be afforded at all times, and that when these are advanced, the company is reaching out for extortionate profits.

Now there are few important lines in the country that have not at some time in their history been carrying freight at prices that if long continued would cause bankruptcy. But to a large proportion of the public the fact that the rates were accepted was proof that they were reasonable; and when advanced rates are complained of, the complainants, to demonstrate their unreasonableness, go back to the war prices, and cite them as conclusive proof of what the companies then charging them can afford to accept. Many popular complaints have their origin in the ideas regarding rates which these wars have engendered or fed, and the evils of the controversies do not end when the controversies are over, but may continue to disturb the relations of railroad companies with their patrons for many years afterwards.

Wars of Rates.—It may be truly said, also, that while rail-

road competition is to be protected, wars in railroad rates unrestrained by competitive principles are disturbers in every direction; if the community reaps a temporary advantage, it is one whose benefits are unequally distributed, and these are likely to be more than counterbalanced by the incidental unsettling of prices and interference with safe business calculations. The public authorities at the same time find that the task of regulation has been made more troublesome and difficult through the effect of war rates upon the public mind. These are consequences which result so inevitably from this species of warfare, that it would naturally be expected they would be kept constantly in mind by railroad managers. It is inevitable that the probability that any prescribed rates will be accepted by the public as just shall to some extent be affected by the fact that at some previous time they have been lower; perhaps considerably lower.

The disproportion between the rate charged and the distance the property is carried is also important in its effect upon the minds of those who have not the time or perhaps the opportunity to study the subject and understand the reasons. There are grounds on which short-haul traffic may be charged more in proportion to the distance of transportation than long-haul traffic, some of which any one would readily understand and appreciate. Thus, it is seen that a considerable proportion of the carrier's service is the same whether the transportation is for the short or for the long distance; there must be the same loading and unloading, the same number of papers and entries on books, and so on. It is also seen that short-haul traffic is more often taken up and laid down in small quantities, and that for this reason the proportionate train service is much greater.

But when all these considerations are taken into account it will still appear that the long-haul traffic is given an advantage in rates which must be accounted for on grounds which are not so readily apparent. When the reasons are seen it may perhaps appear that there is in fact no wrong either to the shippers who are apparently discriminated against, or to the general public.

The Grouping System.—It is not uncommon that in railroad freight service the rates for the transportation of a particular kind of property, instead of being regularly progressive, shall be found arranged on a system of grouping, whereby the charges to all points within a defined territory shall be the same, though the distances will vary. Thus, at the present time the rates which are made from New York to Chicago are also made from New York to all points within a territory about Chicago, which includes some important towns in western Indiana and western Michigan. A question might be made by such towns whether grouping them with Chicago and making them pay the same rates is just; but the grouping system in general departs so little from the distance proportions that it is seldom the ground of complaint.

There are cases, however, in which the distance proportions are purposely disregarded, and the doing so is justified by the managers on the negative ground that no one is wronged by it, and on the affirmative ground that the public is benefited. Cases of the sort may perhaps be found about all our large cities in which the railroads, as to some particular agricultural production needed for daily consumption in the city, have gradually extended the area from which they would receive and transport it at the lowest rates, until they may be found carrying the article at the same price for 100 miles as for 20. The low rate for the long distance has extended the area of production and benefited the city; and it is possible to conceive of cases in which the opposite course, of taking distance into the account in all rate making, would have kept production so far restricted in territory that producers near the city could never have been given as low rates as they receive now, when they are charged the same as their more distant competitors. Where such a case appears, the failure to measure the charges from regard to distance could not dogmatically be pronounced unjust, if it appeared that the railroad on the one side, and the public on the other, were benefited by the course actually adopted. But to increase the rates to the nearer producers, or even to keep them at a point which, though fair in the first place, has in the course of events become unreasonably high, in order to

be able to put those at a distance on an equal footing in the market with such nearer producers, would be manifestly unjust. Not even on the grounds of general public advantage do we understand that this would be justified; for public benefits, when they are to be had at the cost of individual citizens, cannot rightfully, nor we suppose, lawfully, be assessed on one class of the people exclusively.

Reasons for Disparity in Rates.—The great disparity in the charges of different roads for the transportation of the same kind of property is a prolific cause of complaint, sometimes justly founded and sometimes not. It is apparent sometimes, in the complaints which are made to the Commission, that the parties complaining hold the opinion, or at least have an impression, that the cost of transporting a particular species of property is substantially the same on all roads, and that consequently the charges made by one road may prove with tolerable certainty that the higher charges made by another road are unjust. If the circumstances and conditions under which the traffic is carried by the two roads are substantially the same, the comparison would be legitimate and the argument from it of very great force. But when any such comparison is made, there are some circumstances having an important bearing upon rates which cannot be left out of view. Among these may be specified:

The Length of Haul.—A thousand tons of wheat can be loaded, transported a thousand miles, and delivered much more cheaply in proportion to distance than the same quantity can be loaded, transported one hundred miles, and delivered.

The Quantity Hauled.—A train load of coal can be transported more cheaply in proportion to quantity than a single car load, and a car load more cheaply than a hundred pounds. So if the business is large, though it be the transportation of many kinds of property, it can be done relatively more cheaply than if it were small.

Return Freights.—If lumber or other property in quantity is to be delivered at points where there will be return loads for the same cars, the delivery can be made much more

cheaply than at points where return freights could not be expected.

Cost of Moving Trains.—This is very much less on some roads than on others by reason of lighter grades, cheaper fuel, less liability to obstruction from storms, and other causes which may disturb the track or delay trains.

These are among the causes which have an important bearing on relative rates. Beyond these the relative cost of roads must be allowed force also, if the owners are to be permitted to charge such rates as will make their investments remunerative. A complaint that rates are unreasonable may therefore require for its proper adjudication a careful inquiry not only into the circumstances and conditions of the road which makes them and of the traffic upon it, but also into those of other roads whose lower rates are supposed by comparison to show the injustice of the rates complained of.

But there are reasons which make it necessary, in adjudicating a case of alleged excessive rates, to consider rates on other lines or at other points, even when the complaining party makes no argument or draws no conclusion from them. Questions of rates on one line or at one point can not be considered by themselves exclusively; a change in them may affect the rates in a considerable part of the country. Rates from the interior to New York necessarily have close relation to rates from the same points to Philadelphia, Boston, and Baltimore; rates from the sea-board to Toledo must have a similar relation to those from the sea-board to Detroit and other towns whose business men compete with those of Toledo in a common territory. Just rates are always relative; the act itself provides for its being so when it forbids unjust discrimination as between localities. This prohibition may sometimes give to competition an effect upon rates beyond what it would have if the competitive forces alone were considered.

The Commission has had occasion, where a railroad company operated lines which run parallel to each other, to hold that if the company yielded to competitive forces so far as to give the towns on one line very low rates, the effect of

such low rates upon the business of rival towns on the other line could not be ignored when their rates came under consideration. The natural influence of just competitive forces ought to be allowed as it would be as between two lines owned by different companies ; and if the rates on one line were made very low because of competition, keeping the others high because the absence of competition enabled it to be done might amount, within the meaning of the law, to unjust discrimination. Consolidation of rival lines, or the bringing them under the same management, can not justify ignoring on one line the effect of competitive forces on the other ; those forces always, when not unnaturally restrained, have an influence which reaches beyond the points whose business is controlled by it, and by secondary effect modifies prices to more distant points. This is well understood in the transportation business ; the modifying effect of rates by lake and canal is perceived in the charges on all lines from the Mississippi to the sea-board ; the rates to and from Duluth affect all charges in the Northwest to and from Chicago. Any arrangement by consolidation or otherwise that should undertake to eliminate this influence would, if made on a large scale, be futile, because it would antagonize laws of trade and communication which would be too powerful for it, and on a small scale, affecting particular towns or small districts, it might be illegal from its manifest inequality or injustice.

Competition.—A study of the Act to regulate commerce has satisfied the members of the Commission that it was intended in its passage to preserve for the people the benefits of competition as between the several transportation lines of the country. If that shall be done the towns which have great natural advantages, or advantages acquired by large expenditures of money in establishing new thoroughfares of commerce, will have cheaper rates than can ordinarily be obtained by towns less favorably situated. New York with its noble harbor, its central location, the Hudson River, and the Erie Canal for interior water-ways, can not be deprived of the benefits which spring from these great natural and acquired advantages without altogether eliminating competition

as a force in transportation charges, and by an exercise of sovereign legislative power establishing arbitrary rates over the whole country.

It might possibly be within the competency of legislative power to prescribe for the several interstate railroads equal mileage rates for the whole country; but this, if enforced, would put an end to competition as a factor in making rates, and to a very large extent deprive the great business centers of the country of their several natural advantages, and also of the benefit of expenditures made by them in creating for themselves new channels of trade. It would, in fact, work a revolution in the business of the country, which, though it might be greatly beneficial in some directions, would be fearfully destructive in others. Congress has not by the existing legislation undertaken to inaugurate such a revolution; nothing in the Act to regulate commerce looks in that direction, unless it be the prohibition to charge more for a shorter than for a longer haul on the same line in the same direction, the shorter being included in the longer distance. But that prohibition is not absolute, and if it were, a strict enforcement would necessarily be at the expense of the competitive centers which have heretofore had the exceptionally low rates. The rates have made them centers for a valuable wholesale trade which they cannot expect to retain permanently in its entirety if they are deprived even in part of the advantages which they have hitherto had from the competition of rival carriers. The benefit which non-competitive points receive must be largely at the expense of the competitive. This is one of the inevitable consequences of perfecting the reform in the direction of basing rates upon distance more than has been the case hitherto. It is an incidental disadvantage to some which is supposed to be more than made up by the more equal apportionment of transportation benefits.

The competition by water is the most important factor in forcing rates to a low level at the points where the lines of land and water transportation intersect. Where there are good channels of water transportation, the cost of moving traffic upon it is so very greatly below the cost of rail trans-

portation that the railroads would scarcely be able to compete at all if rapidity in transit were not in most cases a matter of such importance that it enables the railroads to demand and obtain higher rates than are made by boat. But even when compensated for the extra speed, the rates which the roads can obtain in competition with the natural waterways must be extremely low and in some cases leave little if any margin for profit. The experience of the country has demonstrated that the artificial waterways cannot be successful competitors with the railroads on equal terms. If the effort is to make the business upon them pay the cost of their maintenance and a fair return upon the capital invested in them, its futility must soon appear. The railroads long since deprived the great canals of Ohio, Indiana, and Illinois of nearly all their importance, and the Erie Canal is only maintained as a great channel of trade by the liberality of the State of New York in making its use free ; the State thus taking upon itself a large share of the cost of transportation which would be assessed upon the property carried if the canal were owned and held for the profit of operation as the railroads are.

In their competitive struggles with each other towns can not ignore the effect which the existence of natural waterways must have upon rail road tariffs ; the railroad companies can not ignore it, nor can the Commission ignore it if competition is still to exist and be allowed its force according to natural laws. Neither can the great free Erie Canal be ignored ; it influences the rates to New York more than any other one cause, and indirectly, through its influence upon the rates to New York, it influences those to all other seaboard cities, and indeed to all that section of the country.

Other considerations bearing upon the reasonableness of rates might be mentioned, but enough has been said to show the difficulty of the task which the law has cast upon the Commission, and the impossibility that that task shall be so performed as to give satisfaction to all complaints. The question of rates, as has already been shown, is often quite as much a question between rival interests and localities as between the railroads and any one or more of such localities or interests ; but while each strives to secure such rates as

will most benefit itself, the Commission must look beyond the parties complaining and complained of, and make its decisions on a survey of the whole field, that either directly or indirectly will be affected by them.

GENERAL OBSERVATIONS.

The Act to regulate commerce has now been in operation nearly eight months. One immediate effect was to cause inconvenience in many quarters, and even yet the business of some parts of the country is not fully adjusted to it. Some carriers also are not as yet in their operations conforming in all respects to its spirit and purpose. Nevertheless the Commission feels justified in saying that the operation of the Act has in general been beneficial. In some particulars, as we understand has also been the case with similar statutes in some of the States, it has operated directly to increase railroad earnings, especially in the cutting off of free passes on interstate passenger traffic, and in putting an end to rebates, drawbacks, and special rates upon freight business. The results of the law in these respects are also eminently satisfactory to the general public, certainly to all who had not been wont to profit by special or personal advantages. In connection with the abolition of the pass system, there has been some reduction in passenger fares, especially in the charge made for mileage tickets in the Northwest, the section of the country where they are perhaps most employed.

Freight traffic for the year has been exceptionally large in volume, and is believed to have been in no small degree stimulated by a growing confidence that the days of rebates and special rates were ended, and that open rates on an equal basis were now offered to all comers. The reflex action of this development of confidence among business men has been highly favorable to the roads.

In some localities the passage of the Act was made the occasion on the part of dissatisfied and short-sighted railroad managers for new exactions, through a direct raising of rates, by change in classification and otherwise. The manifestation of the spirit which induced such action is now but seldom observed, and the wrongs resulting from it have in

general been corrected. The effect of the operation of the fourth section has been specially described above, and the Commission repeats in this place its opinion that, however serious may have been the results in some cases, the general effect has been beneficial. The changes in classification made since the Act took effect have been in the direction of greater uniformity, and have also in general, it is believed, been concessions to business interests.

The tendency of rates has been downward, and they have seldom been permanently advanced except when excessive competition had reduced them to points at which they could not well be maintained. No destructive rate wars have occurred, but increased stability in rates has tended in the direction of stability in general business. There is still, however, great mischief resulting from frequent changes in freight rates on the part of some companies; changes that in some cases it is difficult to suggest excuse for.

The general results of the law have been in important ways favorable to both the roads and the public; while the comparatively few complaints that have been heard of its results are either made with imperfect knowledge of the facts, or spring from the remembrance of practices which the law was deliberately framed to put an end to.

AMENDMENTS OF THE LAW.

The Commission has not seen occasion for recommending any very considerable changes in the Act under which its work is performed. It has seemed to its members that the law for the regulation of interstate commerce should be permitted to have a growth, and that it would most surely as well as most safely attain a high degree of efficiency and usefulness in that way. The general features of the Act are grounded in principles that will stand the test of time and experience, and only time and experience can determine whether all the provisions made for their enforcement are safe, sound, and workable. When they prove not to be, experience will be a safe guide in legislation to perfect them.

Incidentally in this report some need of amendment has

been pointed out. Especially ought the law, as we think, to indicate in plain terms whether the express business and all other transportation by the carriers named in the Act shall be governed by its provisions. The provision against the sudden raising of rates ought to be clearly made applicable to joint rates as well as to others. The Commission ought also to have the authority and the means to bring about something like uniformity in the method of publishing rates, which is now in great confusion, and to carefully examine, collect, and supervise the schedules, contracts, etc., required by the law to be filed, as well as properly to handle the mass of statistical information called for by the twentieth section. For all these purposes, as well as for others imperfectly provided for, a considerable addition to the force employed with the Commission will be indispensable.

Other matters, and particularly whether transportation by water shall be made subject to the Act, are submitted to the wisdom of Congress without recommendation.

All which is respectfully submitted.

Dated December 1, 1887.

THOMAS M. COOLEY,
WILLIAM R. MORRISON,
AUGUSTUS SCHOONMAKER,
ALDACE F. WALKER,
WALTER L. BRAGG.

Interstate Commerce Commissioners.

MILTON EVANS *v.* THE OREGON RAILWAY AND
NAVIGATION COMPANY

AND

WILLIAM H. REED *v.* THE OREGON RAILWAY
AND NAVIGATION COMPANY.

Tried October 12; decided December 3, 1887.

In determining what is a just and reasonable rate for a particular commodity (for example, wheat), the Commission will take into consideration the earnings and expenses of operation, the rates charged upon the same commodity by other roads as nearly similarly situated as may be, the diversities between the railroad in question and such other railroads, the relative amount of through and local business, the proportion borne by the commodity in question to the remainder of the local traffic, the market value of the commodity and its gradual reduction, the reductions made by the carrier upon other articles which are consumed and necessarily required by the producers of the article in question, and all other circumstances affecting the traffic of itself, and as related to other considerations entering into the charges of the carrier.

Upon the facts shown by the evidence in the present case, held that the rate on wheat from Walla Walla City to Portland should not exceed twenty-three and one-half cents per hundred pounds when transported by the defendant railroad for the remainder of the present grain season, extending to the 30th of June, 1888.

B. L. Sharpstein, Charles S. Voorhees, William H. Reed,
for complainants.

McDonald, Bright & Fay, C. B. Ballinger, for defendants.

REPORT AND OPINION OF THE INTERSTATE COMMERCE COM-
MISSION.

BRAGG, *Commissioner* :

These complaints involve the same question as to the reasonableness of the freight rates of the Oregon Railway & Navigation Company on wheat shipped from Walla Walla, in Washington Territory, over its line to Portland, Oregon. By consent of the parties they were heard together and will be disposed of by us in the same manner.

The complaint of the petitioner, Milton Evans, is that on the 26th day of April, 1887, the defendant charged and collected from him \$81.00 for transporting 27,000 pounds of wheat from Walla Walla city to the city of Portland, which he claims was an unreasonable and extortionate charge.

The complaint of William H. Reed alleges that on the 26th day of May, 1887, the defendant charged him \$72.00 on a shipment of 24,000 pounds of wheat from Walla Walla city to Portland, Oregon, which he alleges was an unreasonable and extortionate charge. The charge in each instance was thirty cents per hundred pounds. The prayer of each petition is that the rates of defendant on wheat from Walla Walla to Portland shall be reduced to three dollars per ton or fifteen cents per 100 pounds.

The defendant admits the making of each of these charges, and insists that they are reasonable and just. The grounds upon which the defendant in its answer justifies these charges are substantially the same as to each complaint, and may be briefly stated as follows :

That its road extends from the city of Portland, in the State of Oregon, to the city of Walla Walla, in Washington Territory, a distance of two hundred and forty-six miles, and is necessarily constructed and operated for the most part through a rugged and mountainous country, with extraordinary grades and curves, and, being so constructed, is operated at exceptionally great expense.

That between the city of Portland and Dalles city, a distance of eighty-eight miles, its road runs over and across the Cascade Mountains in the State of Oregon, and the adjoining mountainous country is unproductive and unsettled.

That during the winter season the operation of this part of its road is frequently interrupted by storms and snow blockades and land slides, and defendant is thereby subjected to extraordinary expense ; that between Dalles city and the city of Walla Walla the defendant's road, for the greater part of the way, runs through a sandy and unproductive desert, and is subject to frequent obstruction from sand drifts ; that its ties and bridge sub-structures along this portion of its line required to be renewed every six or seven years on account of deterioration caused by alkali in the soil.

That defendant's road consists of five hundred and seventy-six miles of main track and runs through the counties of Wasco, Gilliam, Umatilla, Union, and Baker, in the State of Oregon, and the counties of Walla Walla, Columbia, and

Garfield, in Washington Territory ; that said counties contain in the aggregate 33,441 square miles ; that the population of said counties is in the aggregate 58,520 persons.

That the total way freights between Portland and Dalles city during the eleven months ending May 31st, 1887, amounted to the sum of \$424.86.

That the whole local traffic, both passenger and freight, between the city of Portland and Walla Walla, including the business received at these points during the eleven months ending May 31st, 1887, amounted to the sum of \$606,450.39, and the operating expenses of that portion of said road amounted during the same time to \$792,490.

That wheat furnished much the largest part of the freight shipped over defendant's line ; that the total wheat shipped during the eleven months ending May 31st, 1887, over all defendant's lines of road was 121,152 tons, and that the total from Walla Walla during the same time was 15,249 tons ; that the amount shipped from Walla Walla during the month of May, 1887, was but 167 tons.

That, owing to the lack of storage facilities and the condition of the markets and the manner of transporting said wheat from tide-water, it is necessary that the whole crop in said vicinity should be removed in a space of about one hundred days after the same has been harvested ; that during the remainder of the year but little wheat or other freight is shipped from the vicinity where said wheat is grown.

That during all of said shipping season the cars in which said wheat is shipped to Portland, Oregon, are, on account of the absence of freight shipped in the vicinity from which said wheat is taken, hauled empty from the city of Portland to Walla Walla, so that, in fact, the cars in which said wheat is hauled for that work are transported double the distance of such haul.

That the cost and expense of fuel used by defendant in the operation of its said railroad greatly exceeds the cost of fuel upon the railroads in the United States generally, and that defendant, since the opening of its road, has never been able to procure the same at a price less than six dollars per ton of an inferior quality of coal at the city of Portland, which,

must necessarily thereafter be transported along the line of defendant's railroad as required.

That labor in the vicinity where defendant's road is operated is excessively high and exceeds by at least 25 per cent. the price paid therefor upon other railroads in the United States, and skilled labor, like engineers of capacity and experience required in the operation of defendant's railroad, exceeds that amount.

That defendant has constructed its said railroad solely by private capital invested in the enterprise, and without any Government, State, or municipal aid.

That the capital stock and bonded indebtedness of defendant's railroad represent only the actual paid-up capital and moneys actually invested in its business, and the fixed charges upon that portion of its said road exceed, at the present time, at the present rate of freights and fares, the whole amount of the income derived from the business of said road between the city of Portland and the city of Walla Walla upon all freights and fares between said points, including all freights and fares received at Walla Walla and at Portland, so that if defendant were compelled to rely entirely upon the local traffic between these two points and that originating at the said cities of Walla Walla and Portland, at the present rates and fares, the income from the said railroad would not be sufficient to pay its said fixed charges and maintenance, without making any returns whatever upon its capital stock expended in building said railroad.

That at its present tariff rates, with the most economical management possible on all the lines of its system, the defendant is able to pay no more than six per cent. per annum upon its paid-up capital stock, while the ordinary rates of interest upon first class loans in Walla Walla and vicinity of defendant's railroad is ten per cent. per annum.

That defendant has been engaged in operating its said railroad between the cities of Portland and Walla Walla since the 21st of November, 1882, at which date the first through train was run between the terminal points aforesaid; that up to and at the time when the defendant commenced to carry wheat from the city of Walla Walla and vicinity to

the city of Portland the least charge upon wheat shipped from Walla Walla to Portland was \$12.00 per ton, but that year by year since that time, as the country has become settled and its products increased, the defendant has decreased its rates upon wheat from \$12.00 per ton to \$6.00 per ton, and, in anticipation of a larger yield for the year 1887, defendant had, before it had notice of the filing or making of the complaints herein, determined upon a further reduction to \$5.00 per ton upon and for the crop of 1887, which rates were and are to take effect on the 5th day of July, 1887, and are to apply to freights to all points equally distant, and that these reductions have been made voluntarily and in the absence of competition, and that it is the intention of the defendant to make further reductions as the increased traffic will permit, and to this end the defendant is now engaged in the construction of branch lines into sections of the country which are without transportation facilities.

The defendant alleges that the adoption of a rate of freight charges for its road as low as that prayed for in these complaints would make it impossible to operate its road and pay operating expenses and cost of repairs, to say nothing of dividends or interest ; and that such rate would prevent the construction of the new lines now under way and in contemplation by defendant, and would, in effect, destroy its entire property as an investment.

The evidence in these cases, by deposition, orally, and submitted in the shape of documentary evidence, has taken a wide range, not more so, perhaps, than is usual and permissible in cases of this description, where the question involved is one of the reasonableness of rates and which must always be determined from a variety of circumstances, conditions, and considerations. On the part of the petitioners it relates to the topography of the country over which the road-bed of the defendant is constructed ; the value of the wheat in the market at Portland and Walla Walla ; the freight rates charged on wheat by railroads in Dakota, Minnesota, Iowa, Wisconsin, and Illinois ; the recommendations of the State Railroad Commissioners of Oregon in cases that it is claimed are similar, and to the receipts and expenditures and income

derived by the defendant from the business of its lines from which it is claimed by the petitioners that the net earnings, after deducting the interest paid on the bonded indebtedness, would leave to be paid on the capital stock of the defendant an amount of between ten and eleven per cent. per annum. On the part of the defendant the evidence taken is directed to maintaining the points of defense made in its answers above enumerated.

Without reciting the details of this mass of evidence, which, for the purposes of this report and opinion, would be wholly unnecessary, but all of which we have carefully considered, we content ourselves with stating in substance, the facts we find from it material to the inquiry involved. Exclusive of the Columbia and Palouse Railroad, the Oregon Railway and Navigation Company operates a main track of five hundred and seventy-six miles. That portion of its system which extends from Portland to Walla Walla is two hundred and forty-six miles in length, and is constructed along the Columbia river a distance of one hundred and eighty-seven miles to Umatilla Junction. From Umatilla Junction one branch of this railroad is constructed southeasterly through the counties of Umatilla, Union, and Baker, in the State of Oregon, to Huntington, where it connects with the Oregon Short Line, and with that and the Union Pacific forms a through line from the Missouri river to Portland. The other line of this railroad extends from Umatilla Junction up the Columbia river about twenty-seven miles to Wallula, where it connects with the Northern Pacific, the two forming a through line from St. Paul to Portland. From Wallula Junction there is a branch of this road easterly about thirty-two miles to Walla Walla city, at which point it connects with the Pendleton Branch of the defendant's system from the south. From Walla Walla the road runs northeasterly twenty-three miles to Bolles' Junction, at which point it branches, one branch running easterly thirteen miles to Dayton, the other extending northerly twenty-three miles to Starbuck, where it branches again, one branch going easterly about thirty miles to Pomeroy, the other branch continuing northerly about nine miles to Snake river. The maxi-

mum up grade per mile on said road from the city of Portland easterly to Walla Walla is fifty-nine feet. The highest altitude above mean low tide at Astoria of said road, where it crosses the Cascade Mountains between Portland and Dalles, is one hundred and thirty-four feet, and the highest elevation of the road-bed of said road above high-water mark of the Columbia river, between said points, is one hundred and nineteen feet.

During the year 1884-'5 the removal of snow blockades between Portland and Dalles cost this company \$190,005.66; during the year 1885-'6, \$19,207.06; during the year 1886-'7, \$10,702.07. During the year 1886 the defendant employed a force of sand-shovelers to prevent this road from being obstructed by sand-drifts, for which it paid \$11,205.93; and in the year 1887, for the same service, \$15,565.25. Between Portland and Dalles city, a distance of eighty-eight miles, the defendant's railroad runs for most of the distance along the Columbia river, and the defendant owns and runs a daily line of steamers between said cities, carrying both way and through freights and passengers. The amount of wheat shipped over this road from stations between Wallula Junction and Dalles city, including Wallula Junction, during the fall of 1886 and the winter of 1886-'87 was 8,340 tons. The time of this shipment extends from September to March, inclusive, a period during which the great bulk of wheat shipments are made, though occasionally small shipments are made in April, May, and June, and the wheat shipped is the product of both sides of the Columbia river. There has been a steady and large increase in shipments of wheat over defendant's road every year during the last four or five years. Since the defendant began the operation of this road through from Portland to Walla Walla it has reduced freights on wheat shipments between these points from \$12.00 per ton to \$6.00 per ton, and this without any competition which forced it. The bulk of defendant's traffic is received from the Northern Pacific at Wallula Junction, from the Mountain Division of defendant's road at Umatilla Junction and from the eastern extension of defendant's road from Snake river, Walla Walla being an intermediate point on the last-named road

between its eastern terminus and Portland, and this freight is transported to Portland. The greater portion of this business passes over this line or a portion of this line between Walla Walla and Portland. The freight received from Walla Walla, although that amounts to about 15,000 tons of wheat annually, is small compared with its receipts from the other lines named, its entire receipts of wheat for the year 1886-'7, being about 121,000 tons. The wheat industry of Oregon and Washington Territory on the valley of the Columbia river is very large and is rapidly growing from year to year, the crop of the year 1887 being estimated to be about one-third larger than that of the year 1886. There has been a great decline in the price of wheat on the Pacific coast steadily every year during the last five or six years. The average price of wheat now in the Portland market is about \$1.05 per hundred pounds. By the course of trade wheat shipped from Walla Walla to Portland is exported to Liverpool and other European markets. The country is sparsely settled from Portland to Walla Walla and vicinity. Since April 1st, 1887, the defendant has made general and very large reductions in its freight rates on nearly all commodities transported over its line between Portland and Walla Walla. During the month of July, 1887, defendant made and put in effect a rate on wheat from Walla Walla to Portland of \$5.00 per ton, or twenty-five cents per hundred pounds. Pendleton is 231 miles from Portland, Centerville 248 miles, Blue Mountain 265 miles, and at each of these points defendant has been maintaining a rate of six dollars per ton on wheat shipped to Portland, the same as to Walla Walla, and they appear to have been grouped together for the purposes of this rate. The construction of defendant's roads has been at its own expense, and without any aid—Federal, State, or municipal—either in their building or equipment, and in a new and sparsely-settled country. For the year ending June 30th, 1886, the defendant paid as rental to the Northern Pacific Terminal Company for terminal facilities an expense of \$171,452.36 and for the year ending June 30th, 1887, \$144,266.26. There is no competition between defendant and any other road or water line in the section of

country through which its lines are operated. We find that the net earnings of the Railroad Division of the Oregon Railway and Navigation Company, 576 miles, and exclusive of the Columbia & Palouse Division, for the year ending June 30th, 1886, was \$2,068,488.69, or 52.70 per cent. of its gross earnings, and that its operating expenses per mile were \$3,223.98.

Upon the point of the expense of operation, as well as of earnings, as urged by petitioners, we have compared the earnings and expenses of operation of this company on that division and during that period with other railroads more nearly similarly situated than any other in the United States, as contended by petitioners, and which are also more or less wheat-carrying roads, and from such examination and comparison we find that while the average percentage of expense of operation was not greater on the Railroad Division of the Oregon Railway and Navigation Company than on them and its percentage of net earnings was considerably larger than either of them, yet its wheat rates were very much higher than any of them. The railroads taken for this comparison have been the Missouri Pacific railway, the Chicago, Milwaukee and St. Paul railway, the Burlington, Cedar Rapids, and Northern railway, the Chicago and Northwestern railway, the Chicago, St. Paul, Minneapolis and Omaha railway, the Central Iowa railway, the Atchison, Topeka and Santa Fe railroad, and the Central Vermont Railroad Company.

For the year ending December 31st, 1886, the net earnings of the Missouri Pacific railway were 40.98 per cent. of its gross earnings, and its total expenses per mile were \$4,778.57, its gross earnings being \$8,095.84 per mile.

For the year ending December 31st, 1886, the net earnings of the Chicago, Milwaukee and St. Paul railway were 41.09 per cent. of its gross earnings, and its total expenses per mile were \$2,925.51, its gross earnings being \$4,966.53.

For the year ending December 31st, 1886, the net earnings of the Burlington, Cedar Rapids and Northern railway were 27.30 per cent. of its gross earnings, and its total expenses per mile were \$2,052.36, its gross earnings per mile being \$2,823.20.

For the year ending May 31st, 1886, the net earnings of the Chicago and Northwestern railway were 42.93 per cent. of its gross earnings, and its total expenses per mile were \$3,561.46, its gross earnings per mile being \$6,239.22.

For the year ending December 31st, 1886, the net earnings of the Chicago, St. Paul, Minneapolis and Omaha railway were 37.45 per cent. of its gross earnings, and its total expenses were \$2,841.77 per mile, its gross earnings per mile being \$4,591.27.

For eleven months ending December 31st, 1886, the net earnings of the Central Iowa Railway were 10.42 per cent. of its gross earnings, and its total expenses per mile were \$2,062.69, its gross earnings being \$2,302.65 per mile.

For the year ending December 31st, 1886, the net earnings of the Atchison, Topeka and Santa Fe Railroad were 49.19 per cent. of its gross earnings, and its total expenses per mile were \$3,355.51 ; its gross earnings, \$6,604.57 per mile.

For the year ending June 30th, 1886, the net earnings of the Central Vermont Railroad Company were 31.39 per cent. of its gross earnings, and its total expenses per mile were \$3,841.13, its gross earnings per mile being \$5,598.63.

This list of railroads, except the Central Vermont Railroad Company, was named and selected by the petitioners. We included the Central Vermont Railroad because it is constructed and operated much of its way through a mountainous country, away from populous cities, and its through freights are large in proportion to its local freights.

For the year ending June 30 1886, the gross earnings per mile of the Railroad Division of the Oregon Railway and Navigation Company (576 miles) were \$6,815.11, and the operating expenses per mile during the same period were \$3,223.98.

The wheat rates charged on these respective railroads we find to be as follows :

ROADS.	POINTS.		Distance miles.	Car-load rates—cts per 100 pounds.
	From—	To—		
Missouri Pacific.....	Marion, Kan.....	Atchison, Kan.....	253	20
	Leonora, Kan.....	Atchison, Kan... ..	290	20
Chicago, Milwaukee & St. Paul Railway.....	New Hall, Ia.....	Chicago, Ill.....	248	26
Burlington, Cedar Rap- ids & Northern Rail- way.....	Glennville, Ia.....	Burlington, Ia.....	246	11.5
Chicago & Northwest- ern Railway.....	Warrens, Wis.....	Chicago, Ill.....	245	15
	Luzerne, Ia.....	Chicago, Ill.....	249	18
	Le Mars, Iowa.....	St. Paul, Minn.....	244	20
Chicago, St. Paul, Min- neapolis and Omaha Railway.....	Sioux City, Iowa.....	St. Paul, Minn.....	270	27
	Pipestone, Iowa.....	St. Paul, Minn.....	215	20
	Sioux Falls, Ia.....	St. Paul, Minn.....	241	20
Central of Iowa.....	Marshalltown, Ia....	Chicago, Ill.....	247	18
Atchison, Topeka and Santa Fe Railway.....	Raymond, Kan.....	Atchison, Kan.....	219	18.5
Central Vermont Rail- way.....	On points from Bos- ton.....		250 & 300	17
Oregon Railway & Nav- igation Company.....	Walla Walla.....	Portland.....	246	20

We do not find the expenses of operation of the defendant's railroad lines to be exceptionally high in proportion to its earnings. We find that the wheat shipments amount in a general way to nearly one-fifth of the entire freight-carrying traffic of the defendant between points on its Railroad Division (exclusive of the Columbia and Palouse Division) and Portland, and we are satisfied that this is a much larger percentage of wheat, when compared with its other local freights on this division, than is carried by either of the other railroads above named in proportion to their other local freights. We find from the evidence that the estimated wheat crop along the defendant's Railroad Division is about one-third greater the present year than ever before. We speak of the defendant's "Railroad Division" because it also owns a River Division operated by steamboats on the Columbia River, and an Ocean Division operated by steamships on the Pacific Ocean, besides other properties. We also find that the defendant transports wheat in sacks from Walla Walla to Portland, and that this is a more expensive mode to the carrier of transporting wheat than in car-load quantities of solid wheat received from and delivered to elevators located along railroad lines.

Having considered the evidence and arguments of counsel and parties, we are of opinion that the rate of thirty cents

per hundred pounds charged each of the petitions was too high. We are also of the opinion that a rate of twenty-three and one-half cents per hundred pounds from Walla Walla to Portland, under all the circumstances, would be reasonable. Further than this we are not prepared to say that this wheat rate should now be reduced.

A variety of considerations of a very practical nature must always enter into the making of freight rates by a railroad company, and these also go very far in every instance to determine the question of whether such rates are reasonable or unreasonable. It would be very dangerous to the successful existence of such companies for them to make or be required to make freight rates upon mere theories or conjectures. They have to deal with business as they find it. It is evident in this instance, from the very sparsely-settled country through which its railroad lines are operated, that, outside of the through business which is furnished to the defendant at Wallula by the Northern Pacific Railway and by the Oregon Short Line at Umatilla, one of the chief articles of freight upon which it must depend is the transportation of wheat to Portland. There is this difference between the business of the defendant and each of the other roads with which it has been compared as to the transportation of wheat, and it is a very great difference. Passing through more populous communities, in addition to the through freights furnished by their connections they have a greater variety of local and way freights, and are not compelled to depend, as is the defendant, so largely upon what they receive for the transportation of any one local commodity, such as wheat. They therefore derive revenue from these other sources of local and way freights to a much greater extent than the defendant, and can with confidence rely upon them, and for this reason alone can safely make their rates less on wheat than the defendant. Besides, the wheat hauled by the defendant is transported in sacks, which is a more expensive mode of shipping and delivering wheat than that usually adopted by the other roads with which it has been compared, which is in car-loads of solid wheat received from and delivered to elevators along their lines.

A very large proportion of the business of the defendant is derived from through freights, and cannot at present be otherwise than received from through freights. The volume of through freights fluctuates very greatly, in some seasons being more and in others less, and is frequently influenced by causes beyond the control of a remote carrier like the defendant. These fluctuations are occasionally hazardous to the business of such a carrier. The expense of frequently hauling empty cars to reach this wheat before it can be received for carriage back to Portland is a circumstance that cannot be overlooked in an inquiry of this description, where the reasonableness of the rate charged upon it is the only question involved. The bare statement of these combined considerations, without amplifying them at length, as we could do, by abundant statistics and obvious reasoning, shows them to be vital and of very controlling weight, and that they cannot be ignored in a proceeding of this character.

The defendant's railroad lines are phenomenally well situated in their relation to other transportation facilities and a large field of growing commerce and agriculture; and the consideration of their alleged large earnings has been urged upon us as a circumstance to show that it ought to reduce its rates upon wheat very greatly from Walla Walla to Portland. It is plain to be seen that the revenue derived by the defendant from this valuable property is very remunerative, but as to its amount the evidence is conflicting, and leaves the actual result in inextricable doubt at this time. Upon the theory of petitioners it would be between ten and eleven per cent. net per annum; upon the theory of defendant, and taking into the estimate the several judgments rendered against it for \$210,000.00 by the Federal Court in Oregon, and now pending on appeal in the Supreme Court of the United States, it would be about six per cent. per annum. We have considered this, but it does not change the conclusion we have reached and which has been already stated.

A certified copy of a recommendation made on the 2d day of June, 1887, by the honorable Board of Railroad Commis-

sioners of the State of Oregon to the Oregon Railway and Navigation Company recommending, amongst other things, to reduce its rates on wheat to twenty cents per hundred pounds in car-load lots from certain points east in that State to Portland has been introduced in evidence by petitioners, and is relied on by them as sustaining their views of this case. Among the points thus named are Centreville, Blue Mountain, and Pendleton. A recommendation of that honorable Board as evidence upon any matter to which it relates receives, as it deserves to receive, at our hands a very high and respectful consideration, but we do not know the evidence upon which that recommendation was made, and if we did we would still be constrained to be governed by the evidence that is before us in this proceeding, which involves interstate commerce, and is within a peculiar jurisdiction, which is devolved upon us by the statute.

Shortly after these petitions were filed the defendant, as it had a right to do under the statute, reduced its rate on wheat from Walla Walla to Portland from \$6 per ton to \$5 per ton, or twenty-five cents per hundredweight.

Since the first of April, 1887, the defendant has reduced its rates as follows :

	Cts. per 100 lbs.
Dry goods, boots and shoes.....	33
Sugar, in less than car-loads.....	15
Coffee.....	15
Bacon, in less than car-loads.....	37
Bacon, in car-loads.....	15
Nails, in car-loads and less than car-loads.....	15
Hardware.....	12
Agricultural implements, in less than car-loads.....	33
Lime, in car-loads.....	33
Soap.....	15
Starch, less than car-loads.....	43
Starch, in car-loads.....	58
Barbed wire.....	15
Coal oil, less than car-loads.....	33
Dried fruit.....	43

These are large and general reductions on a fine line of freights, and they are fairly entitled to be taken into consideration in a proceeding of this nature. Rates are, and should be, to a considerable extent, so related to each other in the

manner in which they are laid for the revenue of a railroad that the instances are very frequent in which a change of the freight upon one important article of commerce involves a consideration of the relative rates on other articles. This case is one of that description. A reduction of rates, such as is claimed by petitioners, to fifteen cents per hundred pounds, or three dollars per ton, on wheat shipments from Walla Walla to Portland is one that would be entirely too great under the circumstances by which the defendant is surrounded at this time.

The order, therefore, is that on and after the 15th day of December, 1887, the defendant must cease to charge more than twenty-three and a half cents per hundred pounds, or four dollars and seventy cents per ton, on wheat transported by it over its railroad lines from Walla Walla, in Washington Territory, to Portland, in the State of Oregon, during the present grain season.

The order is also made in this form as to the present grain season upon the statement in the answer of the defendant that further reductions on wheat rates are intended to be made by defendant as soon as this can be done and upon the general course of dealing of defendant, as shown in the proofs, that the rate for the next season on wheat will doubtless be further modified.

WILLIAM H. COUNCILL v. THE WESTERN AND
ATLANTIC RAILROAD COMPANY.

Tried July 23.—Decided December 3, 1887.

The Commission will not go into the question of money damages when the claim presented is in its nature an action of trespass, for the reason that defendant is constitutionally entitled to a trial by jury in such a case.

The Commission is not authorized to award the counsel and attorney's fees, which may be given by a court under the 8th Section of the Act.

Colored people may properly be assigned separate cars on equal terms. Such a separation of the races does not create undue prejudice or unjust preference.

Complainant, a colored man, paid the same fare as other first-class passengers, and it was only fair dealing and common honesty that he should

have the security and convenience of travel for which his money had been taken.

Colored people who buy first-class tickets, must be furnished with accommodations equally safe and comfortable with other first-class passengers. The Commission finds that the car furnished complainant was only second-class in comforts for travel, and that he was thereby subjected to undue prejudice and unreasonable disadvantage, in violation of the Act to regulate commerce.

John R. Brandon and Oscar R. Hundley, for complainant.

Julius L. Brown, for defendant.

REPORT AND OPINION OF THE COMMISSION.

MORRISON, *Commissioner* :

The complaint of Wm. H. Council against the Western and Atlantic Railroad Company states that he is a minister of the Gospel of the African Methodist Church, a school teacher, a citizen of the United States, a resident of Huntsville, in the State of Alabama, where he is principal of the State Colored Normal and Industrial School; and that said railroad company is a common carrier of passengers and property from Chattanooga, in the State of Tennessee, to Atlanta, in the State of Georgia; that, having occasion to visit some of the States east of Alabama in the interest of said school, he had, on April 7, 1887, proceeded as far as Chattanooga, where he purchased of said railroad company a first-class ticket over its road from Chattanooga to Atlanta, and shortly before the train started, entered a car and seated himself without direction from any one as to the car he should take or seat he should occupy. Soon after he went aboard and the train had started, and before his ticket had been asked for, he was told by a man to go into another car. The person making this request did not announce his official character, and the same being unknown to complainant the request was not heeded. And complainant avers that, whether or not such person was an officer, agent, or employee of said company, he had no right or authority to require complainant to change his seat.

The complainant was soon again told to go into another car, this time by a brakeman or person in railroad garb, to

whom complainant answered that when the conductor came for his ticket he, complainant, would go into another car if the conductor so directed. Soon after the second direction to go into another car, the brakeman or employee by whom it was given, returned with two other persons, one carrying a railroad lantern, who again told complainant to go into another car, to which he responded as before, that he would go if told to do so by the conductor. The person holding the lantern, without provocation, struck the complainant with it several blows, cut and bruised his face, and the three together forcibly ejected him from the car and compelled him to go into and occupy another car, in which he rode until the train reached Dalton, Georgia, at which place, in consequence of the injuries and bruises inflicted on him, he left the train. His ticket over the road to Atlanta had been surrendered. These injuries and wrongs were done to complainant in the presence of the passengers seated in the car which he was compelled to vacate, and none of said passengers were told to change their seats nor were they otherwise molested; that the conductor witnessed the violence and had information that it was intended and made no effort to prevent it, and when requested by complainant to protect him and see that his rights as a passenger on said train was respected, his reasonable request was answered by the conductor with harsh and abusive language.

That defendant did, on April 7th, 1887, in respect of the matter stated by complainant, subject him to unreasonable prejudice and disadvantage in violation of the Act to regulate commerce, and especially of the third section of said Act; that, being a colored man, he was in consequence thereof not allowed a seat in said car, while white passengers who had purchased tickets at the same price paid by complainant were allowed to ride in said car, and that, because of his color, he was unreasonably discriminated against and subjected to unreasonable prejudice and disadvantage; that by reason of the public manner of the assault, ejection from the car, bruises received, pain endured, mental anxiety, and humiliation, delay in making his journey, and the unjust discrimination against him he had been damaged in the sum of \$25,000,

which he asks may be awarded to him, together with \$1,500 for the reasonable pay of counsel he has been compelled to employ.

The answer of the defendant railroad company admits, or does not contest, the occupation, citizenship, and residence of the complainant as stated in his complaint. It admits that defendant is a common carrier of passengers, that complainant is a colored man and purchased a ticket over its road as stated by him, and does not contest his statement that he on April 7th, 1887, entered the car and seated himself without direction from any one as to the car he might take or the seat he might occupy. Defendant admits that complainant was twice told by employees, its agents, or, as it claims, was politely requested, once by the conductor and once by the brakeman, to go into another car, and that complainant was removed from the car to another by violence, but, as it alleges, not by its agents. It admits that the violence was used in the presence of the passengers in the ladies' car, and that no demand was made upon any other of the passengers to vacate their seats, but it alleges that no others were there in violation of the rules. It admits that complainant left the train at Dalton, Ga., as it avers, for no other reason than that he chose to do so.

It admits "its obligation to furnish to all passengers who pay the same fare equal or like accommodations, and that it has no right to discriminate between classes on account of color, sex, or otherwise, by offering one better accommodations and another inferior accommodations for the same money.

Further answering, the defendant railroad company avers that it has the right to promote good government of its trains and the convenience and comfort of passengers by classifying and requiring those of one color or sex to ride in one car and those of another in a different car, and to avoid confusion and trouble which might result from "crowding persons of the two races together in the same car," it had established a permanent rule or regulation of the company. By this rule a car was and is set apart, called the ladies' car, which no one but a lady, or a gentleman accompanied by a lady, or a

lady and children can enter and occupy until these are seated. If there are vacant seats after the persons entitled to occupy the car are seated white male persons can occupy them until required for ladies who may come on the car. Another car is provided for colored people which white persons are not permitted to occupy without consent of the colored passengers. It is part of this rule that colored persons going into the ladies' car shall be notified by the conductor or brakeman to go into the car provided for them.

Defendant denies that complainant had a right to occupy a seat in the ladies' car and avers that he was aware of defendant's rule, and that he had taken and was occupying a seat in violation thereof; that he was notified that a car on the train had been set apart for colored persons, which he was requested to occupy and which he refused to occupy, insisting that, having paid full fare, he was entitled to ride where he was seated. Defendant further avers that it was the duty of its conductor to have removed complainant to the car provided for colored persons, using as little violence as possible, but that the passengers, offended by his presence in the ladies' car and by his refusal on request to leave it, took the matter in hand, used violence, and ejected complainant from the car, and that no conductor, brakeman, or other of its officers or employees, or any one having any control over the train took any part in the chastisement that was administered to the complainant; "that, on the contrary, they were not aware of any intention to inflict the punishment and did not in any manner countenance or justify the violence to which complainant was subjected."

Defendant, further answering, says that the car provided for the accommodation of colored persons on said train was first class, and denies that it subjected complainant or permitted him to be subjected, as far as it was able to prevent it, to any undue or unreasonable prejudice or disadvantage because of his being a colored person or for any reason whatsoever, and defendant insists that whatever injury, prejudice, or disadvantage complainant suffered it was the result of his own conduct and not the fault of defendant.

On investigation the following facts are found from the

depositions and oral testimony of witnesses, which are, in addition to the facts found in the statements of the complainant not denied in the answer :

1. Regulations setting apart cars for separate use of white and colored persons had been established for said railroad company substantially as stated in its answer. Similar regulations are customary on the railroads of Georgia, Tennessee, and neighboring States. On defendant's road these regulations are not well defined and are seldom enforced, except as to colored persons.

2. The passenger cars in the train were the colored people's car, first after the baggage car; next, the ladies' car, from which the complainant was ejected, and last the sleeping car. The ladies' and colored people's cars were of the same pattern and of like substantial build. The one designated the colored people's car was divided by a partition into two nearly equal apartments, with a door between them opening either way by slight pressure and without a fastening when closed. The rear half end or apartment was the smoking-car for white and colored men by the rules, but for white men in practice. The front half end or apartment, in which smoking was frequent, was the colored car for both sexes. It was badly lighted by a single burner, and contained, for the use of the passengers of both divisions, the one necessity of railroad travel which adds to the convenience without contributing to the cleanliness of the car.

3. If the officers, agents, and employees of the railroad company in control of the train did not plan and participate in the assault on complainant and in his removal from the car, they omitted to discourage or discountenance it. At least two of them—the brakeman and baggage-master—were present in the car, and made no effort to protect complainant from the violence done him.

The complainant alleges that he has been subjected to unreasonable prejudice and unjust discrimination, and claims large money damages for injuries done him and for reasonable fees of attorneys he has been compelled to employ. Under the seventh amendment to the Constitution of the United States the defendant, in any case at common law, is

entitled to a trial by jury. This claim is, in its nature, an action of trespass, and therefore presents such a case; and when, on the hearing, the complainant offered evidence of pecuniary damages as a basis for an award, the Commission, because it could not give such a trial, declined to go into that question. The complainant is, therefore, left to his appropriate remedy in the courts for the alleged trespass and assault upon him. In such a proceeding the defendant may be held liable for counsel or attorneys' fees, "to be fixed by the court," as provided in section 8 of the Act to regulate commerce, and which this Commission is not authorized to award. The claim for damages and attorneys' fees being thus disposed of, it remains to be considered whether railroad companies may lawfully separate their white and colored passengers by providing cars for each, and if the car for colored people on the defendant's road was as safe and comfortable as that provided for white people.

It is both the right and the duty of railroad companies to make such reasonable regulations as will secure order and promote the comfort of their passengers. In the exercise of this right and the performance of this duty, carriers have established rules providing separate cars for ladies, and for gentlemen accompanied by ladies, and their right to make such rules as to sexes is nowhere questioned. A man, white or colored, excluded from the ladies' car by such a rule could hardly claim successfully under the Act to regulate commerce that he had been subjected to unjust discrimination and unreasonable prejudice or disadvantage. It is a custom of the railroad companies in the States where the defendant's road is located, and in all the States where the colored population is considerable, to provide separate cars for the exclusive use of colored and of white people.

In Pennsylvania, where, by regulation, separate seats were provided, a colored woman refused to occupy the seat assigned to her; she was put off the train, and the Supreme Court of the State in that case declared the separation of white and colored passengers in a public conveyance to be a subject of "sound regulation to secure order, promote comfort, preserve peace, and maintain the rights of both car-

riers and passengers." In a later case in Illinois the Supreme Court held that public carriers have no right to discriminate between passengers on account of color "until they do furnish separate seats equal in comfort and safety to those furnished to other travelers," the obvious meaning of which is that to furnish separate seats equal in comfort and safety is not unjust discrimination.

These interpretations of the law are in conformity with the decision of Justice Woods, late of the United States Supreme Court, denying to the children of colored parents in Louisiana, under the laws of that State, the right to "attend the same public schools as those in which white children are educated." In this case Justice Woods said "equality of rights does not necessarily imply identity of rights."

The people of the United States by the votes of their representatives in Congress support the public schools of the country's capital city, and here white and colored children are educated in separate schools. Congress votes public moneys to separate charities; men, black and white, pitch their tents at the base of Washington's Monument to compete in the arts of war in separate organizations. Trades unions, assemblies, and industrial associations maintain and march in separate organizations of white and colored persons.

Public sentiment, wherever the colored population is large, sanctions and requires this separation of races, and this was recognized by counsel representing both complainant and defendant at the hearing. We cannot, therefore, say that there is any undue prejudice or unjust preference in recognizing and acting upon this general sentiment, provided it is done on fair and equal terms. This separation may be carried out on railroad trains without disadvantage to either race and with increased comfort to both.

But the right of the carrier to assign a white man to another car than the ladies' car, or a colored man to a car for his own race, takes nothing from the right of either to have accommodations substantially equal to those of other passengers paying the same fare. The complainant had paid the same fare with other "first-class" passengers. It was no more than

fair dealing and common honesty that he should have the security and conveniences of travel for which his money had been accepted. This was denied to him. He was told to go, and then forcibly removed to the car assigned to passengers of his race. This was a half car, half lighted, in which men and women were huddled together, and where men, white and black, smoked at pleasure. The defendant's witness, who testified that he struck the complainant several blows and removed him, designated the car into which he forced complainant a "second-class" car; and such it was, being dismal, less clean, and less comfortable than the car in which he was first seated and not permitted to ride.

The manner of his removal need not be discussed here, since the alleged assault and trespass is not to be here considered.

There was in the train no car furnishing the accommodations for which the complainant had paid and was entitled to have, other than the one from which he was removed because he was a colored man. In denying to complainant equal accommodations furnished the other passengers paying the same fare the railroad company subjected him to undue prejudice and unreasonable disadvantage, in violation of the Act to regulate commerce, and these unlawful acts and all unjust discriminations must be discontinued.

The Western and Atlantic Railroad Company will be notified to cease and desist from subjecting colored persons to undue and unreasonable prejudice and disadvantage in violation of section 3 of the Act to regulate commerce, and from furnishing to colored persons purchasing first-class tickets on its road accommodations which are not equally safe and comfortable with those furnished other first-class passengers.

THOMAS J. REYNOLDS v. THE WESTERN NEW YORK & PENNSYLVANIA RAILWAY COMPANY.

A road being in the hands of a receiver, a complaint was instituted against the company owning it, and in the complaint the receivership was mentioned, but the company was stated as having come into possession of the road, and the receiver was erroneously called the president of the company. The petition was served on him, and an answer was filed by

the company. Under the circumstances it was held proper to allow the petitioner to amend his complaint so as to show the existence of the receivership.

When this case was called for hearing,

Mr. George Zabriskie, for defendant, raised the question whether the case was properly brought.

It appeared that the defendant is the successor by reorganization of the Buffalo, New York & Philadelphia Railroad Company. The property of said company has for some time been in the hands of G. Clinton Gardner as receiver, and when the reorganization took place the receivership was continued by order of the court until January 1, 1888, when it will come to an end, and defendant will manage said property. This proceeding is instituted by petition, which complains of rates charged on railroad ties as excessive. The petition was filed October 17, 1887. The receivership of Mr. Gardner was stated in it as having existed until the reorganization of the company, and it was stated that such reorganization was with Mr. Gardner as president. This last statement appears to have been an error.

The service of the petition was by mail, addressed to Mr. Gardner, as president of the Western New York & Pennsylvania Railroad Company, who acknowledged by letter that it had "been duly received, and referred to Mr. George Zabriskie, counsel for receiver, with request that answer be prepared, and he will advise you further." The answer was duly prepared and filed, in the name of said last-named company, and verified by the president, Mr. Probst; and in it was stated the fact that the reorganized company had not yet come into possession of the road.

E. A. Nash, for the petitioner.

The Commission, without undertaking to decide whether, when a road is thus in the hands of a receiver, it is proper to institute such a proceeding against the corporation itself, held that under the circumstances of this case it would be proper to allow the petitioner to amend so as to show by his petition the existence of the receivership.

Amendment was made accordingly and the case proceeded to a hearing.

IN THE MATTER OF THE EXPRESS COMPANIES.

Heard October 25.—Decided December 28, 1887.

The mere fact that a common carrier does other business besides the transportation of passengers or property, or performs a further service than that of transportation in respect to the articles carried, *held*, not sufficient to exclude the carrier from the operation of the Act, so far as applicable to its business.

The Act to regulate commerce is highly remedial in purpose and scope, and should receive a liberal construction, with the object of making the beneficial result desired by Congress operative to the greatest available extent.

The relation of express companies to interstate commerce considered, with the extent and method of their participation therein. The bringing them within the provisions of the Act found practicable, and on some accounts desirable.

Express business, conducted as a branch of the business of the railroad company, *held* to be subject to the Act.

Express business, conducted by an independent organization, acquiring transportation rights by contract, *held* not to be described in the Act with sufficient precision to warrant the Commission in taking jurisdiction thereof.

OPINION OF COMMISSION.

WALKER, *Commissioner* :

A considerable part of the movement of freight from one State or Territory to another, throughout the United States, is carried on by so-called "Express Companies." Originally suggested, as it seems, by the employment of messengers to carry bank exchanges of money and securities, the system has developed into a very general method of transporting all property of special value or of perishable nature, or when speed in transit is for any reason desired. It is pursued upon substantially all the lines of railroad in the country, as well as upon steamboat lines, stage coaches and other vehicles of carriage. The charges collected for such transportation are relatively high, as compared with the ordinary freight business of railroad and steamboat companies, but the service is rapid and accurate. The existence of express companies and the facilities which they furnish have developed to immense proportions a business adapted to the requirements of such traffic. Railroad companies prefer that freight in small parcels and of the nature in other respects

considered appropriate to the express business, especially when quick transit is essential, should be handled by those agencies. The public no doubt is better served by them in some respects than it would be by the ordinary methods of railroad transportation. For various reasons, therefore, the custom of sending all such business "by express" has become a matter of course, and the methods of its transportation have been highly systematized. In fact, although as to some articles the shipper has a choice whether they shall be sent as express matter or as freight, there are many which the railroad companies seem to regard as more appropriate for transportation by the express companies, and relinquish wholly to them.

The contract on file in this office between a leading railroad company and the express company which handles its parcel traffic contains the following clause: "All matter seeking transportation by passenger trains shall be considered and treated as express matter (except the personal baggage of passengers on the train, and milk, and excepting such matter as the railroad company, through its representatives, shall elect to carry free of charge); with these exceptions, all such matter shall be turned over to the express company and be carried and delivered by them at the usual rate of charge for such service." Such a stipulation is expressed or understood upon all the lines.

It is claimed as a reason for the surrender of this business by the railroads to the express companies that the rapidity and certainty required in the service can best be secured by a special organization, largely composed of trained servants, whose attention is given exclusively to the handling of this class of traffic, and that the present satisfactory results could not be attained by undertaking to carry it on through the regular employees of the railroad companies. This is, no doubt, in a great measure true. Nevertheless it has been found practicable on some important lines to organize an express service as a department of the traffic of the company. And it should be further remarked that the practice of turning over a branch of the carrier's business to a third party by contract is susceptible of indefinite extension.

Contracts are made with the railroad company to furnish space upon fast trains for the express business, which may be paid for by the year, by the space occupied, by the weight carried, or according to an agreed division of the gross receipts, or of the profits. The method of ascertaining the compensation to be paid for the carriage of the messengers and freight varies greatly in different portions of the country. Perhaps the most usual contract is one which pays to the railroad company forty per cent. of the gross receipts of the express company.

A messenger usually accompanies the express freight in transit, who is not in the employ of the railroad companies, and the business of receiving and delivering the goods and property transported is managed by employees of the express companies, who are generally entirely distinct from the agents of the railroad lines, although at the smaller stations the same person is often employed by both. So far as the public is concerned, this business is wholly done by the express companies, the shipper and receiver of the property having no contract relation with the corporation or person owning the railroad or other system of transportation employed, but dealing exclusively with the express company operating on the route desired, to which alone he looks in case of loss or damage. The express company itself thus becomes a common carrier, employing instrumentalities of commerce in part its own and in part hired from other carriers, and having the responsibilities, duties, liabilities, rights, and liens of a common carrier in its relations with the public. Its position in this respect has been judicially ascertained, is well understood throughout the country, and is not seriously in dispute.

The companies engaged in this peculiar method of conducting interstate traffic are known by the following names :

Adams Express Company.

American Express Company.

Baltimore and Ohio Express Company. (Recently acquired by the United States Ex. Co.)

Canadian Express Company.

Dominion Express Company.

Erie Railroad Express.

National Express Company.

Northern Pacific Express Company.

New York and Boston Dispatch Express Company.

Pacific Express Company.

Southern Express Company.

United States Express Company.

Wells, Fargo & Company.

Each of these companies operates a certain territory as its own, the entire country having been definitely subdivided among them by agreement or by chance. The right of railroad companies to make an exclusive contract with a selected express company for the handling of all the express business upon its line has recently been established by the Supreme Court of the United States. The language used is as follows :

“The reason is obvious why special contracts in reference to this business are necessary. The transportation required is of a kind which must, if possible, be had for the most part on passenger trains. It requires not only speed, but reasonable certainty as to the quantity that will be carried at any one time. As the things carried are to be kept in the personal custody of the messenger or other employee of the express company, it is important that a certain amount of car space should be specially set apart for the business, and that this should, as far as practicable, be put in the exclusive possession of the expressman in charge. As the business to be done is ‘express,’ it implies access to the train for loading at the latest and for unloading at the earliest convenient moment. All this is entirely inconsistent with the idea of an express business on passenger trains free to all express carriers. Railroad companies are by law carriers of both persons and property. Passenger trains have from the beginning been provided for the transportation primarily of passengers and their baggage. This must be done with reasonable promptness and with reasonable comfort to the passenger. The express business on passenger trains is in a degree subordinate to the passenger business, and it is con-

sequently the duty of a railroad company in arranging for the express to see that there is as little interference as possible with the wants of passengers. This implies a special understanding and agreement as to the amount of car space that will be afforded, and the conditions on which it is to be occupied, the particular trains that can be used, the places at which they shall stop, the price to be paid, and all the varying details of a business which is to be adjusted between two public servants, so that each can perform in the best manner its own particular duties. All this must necessarily be a matter of bargain, and it by no means follows that because a railroad company can serve one express company in one way it can as well serve another company in the same way and still perform its other obligations to the public in a satisfactory manner. The car space that can be given to the express business on a passenger train is, to a certain extent, limited, and, as has been seen, that which is allotted to a particular carrier must be, in a measure, under his exclusive control. No express company can do a successful business unless it is at all times reasonably sure of the means it requires for transportation. On important lines one company will at times fill all the space the railroad company can well allow for the business. If this space had to be divided among several companies there might be occasions when the public would be put to inconvenience by delays which could otherwise be avoided. So long as the public are served to their reasonable satisfaction, it is a matter of no importance who serves them. The railroad company performs its whole duty to the public at large and to each individual when it affords the public all reasonable express accommodations. If this is done the railroad company owes no duty to the public as to the particular agencies it shall select for that purpose. The public require the carriage, but the company may choose its own appropriate means of carriage, always provided they are such as to insure reasonable promptness and security."

The express business is, therefore, very largely non-competitive. Cases exist where two or more railroad or steam-

boat lines, over which different express companies have contracts, reach the same terminal or junction points, but, so far as the public are aware, there has been little difficulty in establishing and maintaining agreed rates in such instances. Rate wars or even the existence of any active competition among express companies have seldom, if ever, been heard of. Interchange of traffic between the different companies at points of junction is carried on without friction, usually upon the simple theory that the public in such cases must pay the charges of two companies instead of one.

Their methods of organization are very diverse. Some, like the Southern Express Company and Wells, Fargo & Company, are corporations, holding charters from State Legislatures which authorize them to carry on the express business by name; others, like the American Express Company and the National Express Company, are not corporations, but *quasi* partnerships, with additional powers recognized by legislation in the State of New York, where more than seven persons are united; being called joint stock companies, having transferable shares of stock, with such perpetuity of organization as the articles of the association provide, and the right of suing and being sued in the name of the president or treasurer; but the shareholders being, nevertheless, liable, as partners, among themselves and to the public. There is nothing in the nature of the express business which prevents its being carried on by an ordinary partnership or even by an individual, provided the necessary contracts can be obtained with transportation lines. Others are practically branches or bureaus of the railroad companies themselves, acting under a distinct head and through separate organizations, but the profits of the business accruing to the railroad treasury. Others still are combinations of roads, organized in an aggregate form, for the purpose of transacting the express business of their several lines.

Soon after the organization of this Commission a letter was received from the Canadian Express Company as follows :

“ CANADIAN EXPRESS COMPANY,
“ GENERAL SUPERINTENDENT'S OFFICE,
“ MONTREAL, *April 1st, 1887.*

“ TO THE HON. THE CHAIRMAN OF THE
INTERSTATE COMMERCE COMMITTEE,
“ *Washington, D. C.*

“ DEAR SIR : Will you please inform us whether the law recently enacted, known as the Interstate Commerce Act, will apply to express companies? It has been thought by some that inasmuch as express companies are only forwarders and patrons of the various railways and steamboats, that their operation would not come under this Act. My reason for asking is the fact that this company's business extends into the United States, over the Grand Trunk Railway, between Island Pond, Vt., and Portland, Me., and also over the same company's line between Port Huron, Mich., and Detroit; and, wishing to be in a position to meet all requirements of law, you will greatly oblige us by letting us know our position in this matter.

“ Awaiting your early reply, I remain yours truly,

(Signed)

“ G. CHENEY,
“ *General Superintendent.*”

To which the Commission replied thus :

“ APRIL 4TH, 1887.

“ G. CHENEY, Esq.,

Gen'l Sup't Can. Exp. Co., Montreal, Canada.

“ DEAR SIR : Your letter of the first inst., requesting the decision of the Commission upon the question whether the Interstate Commerce Law applies to express companies, has been laid before the Commission and duly considered.

“ If any express Company desires to be heard by the Commission on the question you raise, an early opportunity will be afforded for the purpose, but until such hearing is applied for, the Commission will assume that the law does apply to such companies.

“ Very resp'y yours,

(Signed)

“ T. M. COOLEY, *Chairman.*”

This Company thereupon filed with the Commission schedules of its rates and charges. Afterwards the Dominion Express Company and the Northern Pacific Express Company also filed schedules under the 6th section of the Act to Regulate Commerce. It becoming apparent that other express companies did not consider the Act as applicable to them, the Commission, on July 19th, 1887, caused the following letter to be sent to each :

“ JULY 19TH, 1887.

“ TO THE ——— EXPRESS COMPANY :

“ The Commission has observed your failure to comply with the requirements of section 6 of the Act of Congress, approved February 4th, 1887, entitled An Act to regulate commerce. In view of the time which has elapsed since the law went into effect it is obvious that this failure on your part is intentional and not merely inadvertent. The reasons for the course taken by your company have not as yet been laid before the Commission, and it has not as yet entertained the consideration of the question whether or not express companies are common carriers subject to the provisions of said Act, further than to say on April 4th, 1887, in answer to an inquiry by the Canadian Express Company, that until a hearing upon the subject is asked for it will assume that the law does apply to such companies. The Commission is now ready to act definitely upon this subject. Your company is therefore notified and requested to comply with the provisions of said section forthwith. Should you desire to be heard upon the matter the Commission, before final action, will entertain the consideration of a written or printed argument, if filed within thirty days, provided you give us notice at once of your intention to do so.

“ For the Commission.

“ Very respectfully,

“ EDWARD A. MOSELEY, *Secretary.*”

To this communication various responses were received. The general manager of the Erie Express Company, under date of July 27th, wrote as follows :

"I enclose herewith a circular issued by this company on April 5th last, which will evidence to the Board of Interstate Commissioners that the Erie Express voluntarily came under the ruling of the interstate law on April 5th, 1887, after the decision of your board in answer to an inquiry made by the Canadian Express Company; also that we are now working on the basis of the circular issued at that time.

"Our tariffs are being prepared as rapidly as possible and will be furnished your Commission as soon as complete.

"Respectfully yours,

(Signed)

"WM. W. CHANDLER, JR.,

"General Manager."

The circular referred to in above letter is as follows :

"Notice.

"ERIE EXPRESS, TARIFF DEPARTMENT,
NEW YORK, APRIL 5, 1887.

"TO AGENTS :

"To conform to the Interstate Commerce Law in effect to-day, which provides that it shall be unlawful to charge or receive any greater compensation for a shorter than a longer distance over the same line in the same direction, the shorter being included in the longer distance, agents are hereby instructed in regard to billing that where a rate to a point on the Erie Express lines is greater than to a point beyond in the same general direction to charge the lesser rate.

"The tariff to comply with the requirements of the law will be changed as soon as possible. I herewith furnish you the rates between New York and Boston to the principal points in the Erie system and rates between intermediate points must not exceed these rates in any instance.

"From New York and Boston to Rochester, N. Y., 125; Buffalo, N. Y., 125; Cleveland, O., 150; Toledo, O., 200; Cincinnati, O., 200; Chicago, Ill., 250.

"Respectfully,

"W. A. DIENEY, JR.,

"Chief of Tariff."

"Approved :

"W. M. CLEMENTS,

"General Manager."

Afterwards, on September 21st, 1887, the Erie Express Company, by its attorney, claimed the benefit of the briefs filed by counsel of the other companies in opposition to the applicability of the Act to the express business.

The Pacific Express Company, on July 27th, wrote the Commission as follows :

“ OMAHA, NEB., JULY 27, 1887.

“ HON. EDW. A. MOSELEY,

“ *Secretary Interstate Commerce Commission,*

“ *Washington, D. C.*

“ DEAR SIR : I beg to acknowledge receipt of your circular letter of 19th instant, reply to which has been delayed by my absence in Oregon.

“ We are advised that American and United States express companies have notified the Commission that they will file arguments against express companies being amenable under the Interstate Commerce Law at an early date. Believing that whatever decision is arrived at it will apply alike to all express companies, and not wishing to occupy the valuable time of the Commissioners with a needless repetition of lengthy argument, we would desire to await the result in those cases and abide by the decision, whatever it may be.

“ While we are advised by counsel that express companies do not come within the scope of the law, so far as the public or our patrons would be affected, we have endeavored to comply with it, and, in fact, have labored diligently to devise some system of schedules that might be printed in accordance with its demands. This seems almost an impossibility even in our system, extending from Portland, Oregon, to New Orleans, and Chicago to El Paso, Texas, with many intermediate and cross lines, changes in lines and cost to us being so frequent.

“ Yours truly,

(Signed),

“ E. M. MORSMAN,

“ *President.*”

This company also enclosed to the Commission a circular issued by it on April 1, 1887, of which the following is a copy :

“ General Circular.

“THE PACIFIC EXPRESS CO.,

“OFFICE OF THE PRESIDENT,

“OMAHA, NEB., *April 1st, 1887.*

“TO ALL EMPLOYEES :

“A majority of the counsel consulted advise that the interstate commerce bill does not apply to express companies, but, pending a decision in the matter, it is the desire of this company to comply with the law. In order to do so you will carefully observe the following instructions :

“First. No preferential rates must be given. All shippers must be charged the same rates for the same service. Like shipments in kind and quantity should be charged for at the same price for all persons.

“This does not interfere with our carrying free the business of the railway companies whose lines we operate, or of railway officials holding our franks, the same as heretofore, or the delivery free of shipments of the Western Union Telegraph Company by deducting charges from way-bill as heretofore instructed. When authorized by superintendent free transportation may be granted employees.

“Second. Tariffs should be kept in a convenient place, and exposed or shown in answer to all legitimate requests, but kept inside of counters to avoid unnecessary wear and destruction.

“Third. All rebates and private rates, if any are in existence, must be withdrawn at once.

“As railway companies are revising their tariffs to comply with the law, necessitating a revision of our own, new tariffs cannot be compiled until we are furnished with railroad rates. New tariffs will be furnished at the earliest date possible.

“Fourth. On any interstate business no less charge should be made for a greater distance than a less distance for the same shipment over identically the same line of road. Agents discovering any discrepancy of this kind in their tariffs will report same at once to superintendents, who will correct and report to this office.

“Fifth. At common points, where competing company's.

rate is less than ours, agents will adopt the lesser rate, making it the public rate, and advise superintendent immediately.

“Yours truly,

E. M. MORSMAN,

“*President.*”

The Southern Express Company, and the other companies generally, accepted the invitation of the Commission to file briefs upon the question stated in the letter to them of July 19. Briefs were filed accordingly as follows:

Clarence A. Seward for the Adams Express Company, accompanied by an opinion of *James A. Logan, Esq.*

Theodore M. Pomeroy, for the American Express Company, the National Express Company, and Wells, Fargo & Company.

W. S. Chisholm for the Southern Express Company.

W. W. McFarland for the United States Express Company.

An opinion furnished Wells, Fargo & Company by *Pillsbury & Blanding* was also filed in behalf of that company.

The position taken in these briefs and opinions was to the effect that the business of express companies is not subject to the provisions of the Act to regulate commerce.

Subsequently intimations were received by the Commission that some of the counsel desired to be heard orally, whereupon the following notice was issued:

“INTERSTATE COMMERCE COMMISSION,

“OFFICE OF THE SECRETARY,

“WASHINGTON, *October 12, 1887.*

“In case any express companies desire to be heard orally by counsel upon the subject of the circular letter of July 19, 1887, in addition to the printed briefs which have been quite generally submitted, the Commission will hear them at its rooms, in the city of Washington, on the 25th day of October, 1887, at 11 o'clock a. m.

“Very truly yours,

“EDWARD A. MOSELEY,

“*Secretary.*”

On the day named oral arguments were made by Messrs. *Seward, Pomeroy, McFarland and Chisholm* for the respective companies represented by them, as above mentioned, and by *Charles Steele* for the Erie Express Company.

In these briefs and arguments it was urged, among other things, that the transportation of property is not the sole business of express companies; that they also perform many other functions that are outside of the commerce which the act attempts to regulate—such as the collection of debts, the presentation and protesting of commercial paper, the recording of instruments of title, the entrance of goods at custom-houses, the performance of other errands, etc.; and it is argued that, since the act does not apply to all the business of express companies, it should not be taken as applicable to any of it; but this would not afford a consistent or reasonable rule of interpretation. The act may very properly apply to the duties of a common carrier in the transportation of persons and property, while leaving other service and business undertaken by the same common carrier unaffected by its provisions. Thus a leading railroad company is authorized to carry on the banking business, and does carry it on; others are owners of real estate, which is sold, rented, and otherwise used and disposed of as a branch of their corporate powers; others are large dealers in coal; others own and carry on, either by lease or directly, hotels, pleasure parks, restaurants, etc.; but it has never been suggested that any or all of these outside transactions operated in any way to relieve the railroad companies from the provisions of the Act to regulate commerce, so far as the same are applicable to service which the public is entitled to demand from those who assume the position of common carriers of passengers and freight; and in like manner there is no reason apparent, in the case of express companies, why the obligations and restrictions of the Act should not be held effective upon their business, so far as it is applicable thereto, arising from the mere fact that other business is also done by them to which those provisions are inapplicable, or that sometimes a further service than that of transportation is performed in respect to the articles carried.

A further claim is urged to the effect that the act in question is a penal statute and that all its provisions must be construed pursuant to the strict rules of construction, which are said to be applied in such cases. Thus it is stated that there are certain features of the Act which are not applicable to the business carried on by express companies, such as the prohibition of the pooling of freight, the reference to tracks and terminal facilities, some of the requirements of section 20 respecting annual reports to be made by carriers subject to the provisions of the Act, etc.; the argument being that unless the party in question can be subjected to all the provisions of what is called a penal statute and can comply with each of them singly it cannot be subject to any of them. While this statute contains certain provisions for penalties, in the execution of which the courts will, no doubt, follow the recognized canons of construction, nevertheless the statute as a whole should be regarded as highly remedial in its purpose and scope. It was clearly designed to secure to the public equal and impartial rights and privileges and to put an end to ancient and well-known abuses in the services rendered by common carriers. Such a statute should be construed liberally, fairly, of course, but always with the object in view of reaching as closely as possible the end proposed by the legislative intention and making the beneficial result desired operative to its greatest available extent.

A railroad company might limit its operation to the transportation of freight, and claim in like manner that because it did not carry both passengers and freight it was not subject to any of the requirements of the statute.

It does not seem proper or right to introduce strained hypotheses in order to deny the effective application of this law to any branch of the business present to the legislative mind in its enactment, which was obviously the regulation of the interstate transportation of persons and property by common carriers.

Looking at the sections of the Act in detail, so far as they declare principles or announce requirements, they will be seen to be quite generally applicable as well to the business of express companies as to that of railroad companies.

For instance : Section 1 requires that all charges made shall be reasonable and just. Section 2 prohibits unjust discrimination. Section 3 prohibits undue and unreasonable preferences. Section 4 makes illegal the charge of a greater sum for a shorter than for a longer distance over the same line in the same direction, when the circumstances and conditions are substantially similar. Section 6 requires the filing and posting of schedules showing the rates, fares, and charges made by the carrier. Section 20 requires annual reports. There seems to be no good reason why all these beneficial requirements could not properly apply to the transportation of freight by express companies, nor is it claimed by them that these rules could not be properly enforced in respect to their business ; in fact, it is generally claimed that they are already observed, and if such be the case their statutory annunciation would be no hardship and would present no impropriety.

The annual reports required from common carriers under section 20 of the Act, if furnished by the express companies, would necessarily present a large amount of information upon a subject regarding which the public is as yet almost entirely ignorant. The amount of capital stock upon which dividends are paid, the amount of funded debt, if any, the amount of money invested in their plant and business, the volume of business transacted and the expense, with its details, the rates charged and the methods upon which the rates are constructed—all these are subjects in which the patrons of these institutions, considering them as interstate common carriers, are interested and have a right to be informed, and in respect to which Congress may properly desire full knowledge, together with the contracts and agreements under which their business is carried by the transportation lines, which are themselves relieved *pro tanto* and by contract from the performance of a public service. The importance of this subject is shown by the following partial table of capitalizations from a reputable financial publication, viz. :

Adams Express.....	\$12,000,000
American Express.....	18,000,000
U. S. Express.....	10,000,000
Wells-Fargo Express.....	6,250,000

It is strenuously claimed by some of these companies that although they would be entirely willing to make public their schedules of charges and their tariffs for transportation of freight and other services, which they hold themselves out as ready at all times to perform for all comers, nevertheless their lines are so long, the number of their stations so great, and the intricacy of detail so enormous that the preparation of such schedules to be filed with the Commission and to be published to the public is practically an impossibility. This can hardly be assumed to be the case, however, especially in view of the fact that the lines of many railroad systems which have complied with the law are also excessively long and intricately involved, and the schedules of rates on file not only cover stations upon the line of these roads themselves, but very largely upon connecting lines as well. It is known, moreover, that in the express business there is very little classification of freight, the tariff being usually upon a uniform basis per hundred pounds, with proportionate charges for less and for greater weights, the stations being very widely grouped, and the charges for other services being governed by fixed rules. In fact, it seems necessary that agents of express companies should be instructed explicitly as to charges to be made by them; and if they can be intelligently notified by instructions from the general offices it would seem quite possible to inform the public also. Moreover, the routes covered by the three express companies which have already filed their schedules with the commission are quite extensive, and, although the tariffs so filed are made up upon different plans, yet they are each intelligible and are sufficient to negative the idea that the thing proposed by Congress is not possible of accomplishment by this class of carriers.

It would seem, therefore, that the bringing of express companies within the salutary provisions of the Act to regulate commerce is practicable and on some accounts desirable. The question remains whether or not this has been accomplished by the statute as it stands.

In respect to some of the express companies there can be little, if any, doubt that they are fully subject to the provisions of the law. When a railroad company itself con-

ducts the parcel traffic on its line by its ordinary transportation staff, or through an independent bureau organized for the purpose, or by means of a combination with other railroad companies in a joint arrangement for the transaction of this so-called express business, it will not be seriously questioned but that this branch of the traffic is subject to the Act to regulate commerce as fully as the ordinary freight traffic.

But the case of the independently organized express companies must be more carefully considered.

The frame of the Act in question is this: The first section provides "that the provisions of this Act shall apply to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad or partly by railroad and partly by water," when the traffic is interstate. The other sections uniformly refer to "any common carrier subject to the provisions of this Act." Therefore the definition in the first section controls the application of the law by stating what carriers are within its terms; and the implication at once arises that common carriers exist which are not subject to the provisions of the Act, which is obviously true of stage coaches, independent steamboat lines, etc.

It is said that the words of the Act above quoted, namely, "wholly by railroad or partly by railroad and partly by water," do not describe the transportation business conducted by express companies, for the reason that their business is largely upon water routes disconnected from railroad lines and upon stage-coach routes, as well as by teams used for the collection and delivery of goods and for their transportation between the termini of connecting lines. A very large proportion of their traffic is by rail. Their exclusion from the operation of the statute upon the ground that in cities and large towns it is customary for express companies to collect and deliver the freight would seem to be too refined a construction to place upon the law. Some railroads do the same thing, and it is much more common in England than here. Wherever it is done in respect to interstate commerce it is obviously merely incidental to the main business, which is the carriage from place to place by railroad. No

separate charge for this service is made, the charge being usually the same whether the goods be received and delivered at the general business office of the carrier or by team at the office or residence of the customer. If additional charge for collection or delivery is made it can easily be stated.

The word "wholly" in the first section of the act may have been used in contradistinction to the word "partly" in the next clause—"wholly by railroad or partly by railroad and partly by water"—and not as a limitation upon the method of carriage with the meaning by railroad solely, or by railroad and not otherwise, as claimed by the express companies; nevertheless, the literal application of the word "wholly" would exclude a great part of the business transacted by express companies, for it can be truthfully said as to the larger percentage of their shipments that they are not "wholly by railroad" or "partly by railroad and partly by water." A great amount of team and messenger service is involved, as well as the use of other vehicles of transportation which are not within the language of the Act. The use of that word in a section which was evidently framed with the greatest care affords a fair foundation for the claim that the Act does not describe the modes of transportation employed by express companies with sufficient precision to bring them within its terms.

It is, moreover, true, as claimed, that the express business, so called, has been of such long standing and presents such a well-known and complete organization in every portion of the country that it must be considered to be a subject which was perfectly understood by Congress at the time of the enactment of the law in question. More than this, it is a business which has heretofore and frequently been the occasion of distinct legislation by Congress, both in connection with railroad business and as contradistinguished therefrom. We have been referred to a series of congressional enactments running back for twenty years, in which the express business, by name, has been the subject of statutory provisions; and the same is true in the legislation of the various States. In view of this the question is asked, If it was the intention of Congress to make the express companies subject to the

provisions of the interstate commerce Act, why did not the law explicitly so state? It is said that the addition of a few words would have amply expressed the legislative intent, if such extent existed. It is argued that the failure to so state clearly expresses a purpose to omit them from its scope; and it is claimed that under the circumstances, the general provision of section 1 should be treated as referring only to railroad companies, either alone or under a common control with water transportation lines. This argument is not without weight in determining the construction of the statute.

It is also said that the Act throughout is obviously directed toward the regulation of railroads and the railroad systems of the country; that the investigation which preceded the enactment of the law was an investigation of railroads and of transportation by railroad companies; that express companies were not alluded to in that investigation, and that no evils connected with the management of public business by them were brought to the attention of Congress. This consideration is also proper and should not be overlooked, although the Commission has reason to believe that the claim made by the express companies that their rates and their methods of rate-making are perfectly satisfactory to the public is somewhat overstated.

It is further claimed that the details of the law in its various provisions are so framed as to apply distinctly to railroads and railroad companies, and that they do not apply to the carriage of property by express companies without various implications and eliminations which give a somewhat strained construction to the language used; and to this reasoning also there is much force. For example, the first paragraph of section 6 requires carriers "to print and keep for public instruction schedules showing the rates and fares and charges for the transportation of passengers and property which any such common carrier has established and which are in force at the time upon its railroad." The words "its railroad," the express companies say, exclude the idea that they are intended by the law, for they have no railroads; they neither own nor operate any railroad lines. It is true that they hire the use of the railroads of railroad companies,

or, in other words, they purchase the right of railroad transportation for goods which they undertake to transport; nevertheless, the language of this section and of other sections is not well chosen to clearly express an intention to bring express companies within their scope.

See, for example, section 5, which forbids pooling. Of course, competing express companies might pool their earnings, for instance, between Chicago and New York, but the language of the section forbids contracts, etc., "for the pooling of freights of different and competing railroads," phraseology which was unfortunately selected if the possibility of an express pool was in the legislative mind. The use of the word "wholly" in the first section of the Act has already been mentioned. The schedules required by section 6 to be posted for public inspection "shall be kept in every depot or station upon any such railroad," words which are not apt to describe the offices of express companies as frequently found in the larger cities and elsewhere, although their meaning if applied to the express business might be sufficiently obvious.

It is proper to note the further fact that in one important particular the legal status of the independent express companies differs materially from that of the railroad companies. They have not in all respects the same *quasi* public character. The right of eminent domain is not invoked in their behalf. Whatever property they own must be acquired by contract, and such transportation facilities by rail or by rail and water as they afford the public must be provided in the same way. The power of Congress in respect to their business rests upon its constitutional control over interstate commerce, which involves the regulation of the relations between common carriers engaged therein and the public, but which in the case of the express companies finds no support in any delegation to them of governmental powers.

A careful examination of the history and the language of the Act to regulate commerce has brought the Commission to the conclusion that the independent express companies are not included among the common carriers declared to be subject to its provisions as they now stand. The fact that a part of

the express business of the country is, as above shown, within the Act, while another and a much larger part of the same business is not so described as to be embraced in the same statute, clearly points out the necessity of further legislative action. Either the entire express business should be left wholly on one side or it should all be included.

The jurisdiction of the Commission is strictly statutory, and cannot be extended by implication over other subjects than those which the Act defines. In any case of doubtful jurisdiction it is far better that the legislative body should resolve the doubt. It has been the object of the Commission, in this review of the case of the express companies, to state their relation to interstate commerce and the extent and method of their participation therein, together with the considerations on which it feels constrained to disclaim the exercise of jurisdiction over such of them as act under independent organizations. If it was intended or is now considered expedient to bring their business within the provisions of the law it is only necessary for Congress unequivocally to state its wish. The subject has been laid before Congress in the annual report of the Commission, and for the time being no other proceedings will be taken.

Extract from "Note on Express Companies," found in Census Report on the Agencies of Transportation, Published in 1883; Vol. IV., page 855.

In addition to the other agencies of transportation, it was contemplated in the Act of March 3, 1879, that the express business of the country should be included in the census. The provision to this effect is to be found in the seventeenth section of the Act referred to, and is as follows:

"The Superintendent of Census shall require and obtain from the owners, proprietors, or managers of every *incorporated express company* the following facts, to wit: Name of corporation or company; capital paid up; total capital stock, and to what extent the same has been watered, and how often corners have been made on such watered stock; length of lines in miles; whether the business is conducted by rail, vessel, or otherwise; total amount paid to railroads or vessels for use of line or lines; number of officers; number of persons engaged in general administration; number of agents and messengers; total receipts; total expenditures, exhibiting separately amount paid for salaries, for repairs, and for general expenses. * * *

"He may require such other information as to the subjects of this section as, in his judgment, may be necessary to secure such returns as will exhibit the transaction of said several companies."

In compliance with this requirement, a schedule was prepared at the Census Office containing the interrogatories appropriate to the collection of the information desired. A letter was addressed from that office to the proper officer of each company or association known to be doing what is usually called an express business, inclosing a copy of this schedule, and demanding a return thereupon. As the result of this effort it was ascertained that the companies and associations in question were in general not incorporated companies within the ordinary significance of that term, the express business of the country being, as it would appear, transacted under a highly anomalous system. Of all the companies addressed, but two, and those not the most important, admitted that they came within the purview of the law. The others represented themselves either as mere business partnerships or else as associations of railroads, apportioning their expenses, pooling their earnings in the carrying of parcels, under agreements often informal, and even subject at times to oral modification or enlargement.

The Adams Express Company, the United States Express Company, and the New York and Boston Despatch Company, for instance, state that they are, severally, but joint partnerships, and pay taxes neither on their capital stock nor on their business; that their officers are perpetual, and not affected by any election through stockholders, it not even being the custom to hold stockholders' meetings. The American Foreign and European Express Company, again, claims that it does not operate in the United States, but considers itself simply as a forwarding agency.

The Pacific Express Company took the place of the express departments of the Kansas Pacific and the Union Pacific railways, and is virtually an association of the Union Pacific, the Missouri Pacific, and the Wabash, St. Louis, and Pacific railways, which carry on the express business upon their own lines under the name of the Pacific Express Company, the stock

being subscribed for (but not issued) on the assumed proportion of the aggregate net proceeds which each system would earn. The net earnings, as nearly as they can be ascertained, are paid to the railways monthly. The company is, in fact, a part of these railways, which include their respective receipts from the express or parcels business in their proper railway accounts.

Under the conditions recited, the Census Office was advised that it was doubtful whether it would be held that companies and associations like the foregoing came within the requirements of the census law, while it was certain that such returns could not be exacted from the companies or associations under the penalties of the statute, penal provisions being always construed strictly.

At the same time that the inadequacy of the provisions of the existing law respecting the companies doing an express business was discovered it was ascertained that much of that business throughout the country was done in such a way as to render it of the highest difficulty, if not virtually impossible, to disentangle it from the general web of railway transactions, even were the parties conducting that business unmistakably subject to the requirements of the law in this respect. Especially was this found to be the case with the officers and employees engaged, who were in a great majority of cases the officers or employees of railroads, already so reported, and giving to the express business only a varying fraction of their time, of which no record was kept. Such a condition of things did not seem to justify the Census Office in a recommendation to Congress of new legislation to enlarge the scope of the provision already recited and to confer upon the agents of the census greater powers. Indeed, only a commission constituted with judicial authority, having the power of subpoena and of summary punishment for contempt, could, with any degree of success, pursue, against unwilling companies, the inquiry into the express business which was in contemplation of Congress in the enactment of the provision recited.

RIDDLE, DEAN & CO. v. THE BALTIMORE & OHIO RAILROAD COMPANY.

Pending before the Interstate Commerce Commission, Washington, D. C., January 9th, 1888.

In deciding upon applications for the Amendment of Complaints, the Commission acts upon the principles recognized in courts of justice.

An amendment which proposes to substitute for the original cause of complaint something quite distinct and different will not be allowed. If the party desires to make a new case he should do so by a new complaint.

BRAGG, Commissioner :

The complainants in this proceeding move to amend their original complaint. The original complaint was filed on the sixth day of September, 1887, and answered by the Baltimore & Ohio Railroad Company on the first day of December, 1887.

The substance of the original complaint, briefly stated, is, that the Baltimore & Ohio Railroad Company, prior to the filing of that complaint, had unjustly discriminated against the Yough Slope Mine in refusing to furnish that mine with its fair share of cars during the month of August, 1887, on shipments of coal to Arthur & Boylan, at Cleveland, Ohio.

The proposed amendment to this original complaint is as follows: "The complainants respectfully ask, that the complaint, dated September 6th, 1887, against the Baltimore & Ohio Railroad Company be amended by the filing of additional complaints as follows:

That said respondent company, during the month of October, 1887, neglected and refused to furnish cars (their proportion each day) to the Yough Slope Mine, Anderson Mine, and other mines, for the transportation of coal to Buffalo, N. Y., and to Chicago, Ill., and further during the months of November and December, 1887, said respondent company refused cars to the aforementioned mines (their proportion each day) for the transportation of coal to Cincinnati, Ohio. That during the aforesaid months, said respondent company gave a preference to shippers of coke on the line of their road by furnishing said coke shippers with more than their pro-

portion of box cars each day for shipments of coke, to the great injury of the aforementioned coal mines, and your petitioners or complainants."

By this proposed amendment, as will be seen, complainants now desire to amend the original complaint by showing unjust discrimination by the defendant company against the "Anderson Mine" and "other mines" in refusing to furnish them cars "for the transportation of coal to Buffalo, N. Y., and to Chicago, Ill., and further, during the months of November and December, 1887, said respondent company refuses the aforementioned mines their proportion each day for the transportation of coal to Cincinnati, Ohio." This amendment thus brings forward, for the first time, mines alleged to have been discriminated against in shipments to points nowhere referred to in the original complaint, and charges violations of the statute against these mines and in these shipments, occurring a considerable period of time after the original complaint was filed, and some of them, in fact, after the original complaint had been answered by the defendant railroad company. The grievances stated in the amendment are new and distinct, entirely separate from, and having no relation to, the grievances mentioned in the original complaint.

In considering complaints and amendments, such as are made and proposed, the Interstate Commerce Commission, under the statute, performs duties that are in their nature judicial. Liberal as our practice has heretofore been, and will continue to be, in allowing amendments to complaints and answers in proceedings before us in the administration of a highly remedial statute, yet there must, under the rules of law, be a limit to this power of amendment; and this limit, we think, would be passed in allowing the amendment here proposed. The alleged grievances averred in this proposed amendment do not constitute grounds of complaint under the circumstances proper to be brought in by way of amendment to the original complaint in this proceeding. That portion of the proposed amendment which charges that the defendant company gave a preference "to shippers of coke on the line of their road by furnishing said coke ship-

pers with more than their proportion of box cars each day for shipment of coke during the aforesaid months " is equally obnoxious to the objection above stated. The matters mentioned in this proposed amendment may be subjects for a new petition if complainants desire to present such a complaint, but not by way of amendment to the original petition.

The proposed amendment is, therefore, not allowed by the Commission.

RIDDLE, DEAN & COMPANY *vs.* THE PITTSBURGH AND LAKE ERIE RAILROAD CO.

Heard December 6 and 7, 1887: decided January 14, 1888.

Where according to its usual experience a railroad company has sufficient equipment to meet the demands upon it, and to move without unreasonable delay the freights offered, but by reason of unusual circumstances for which the Company is not in fault, freights have accumulated to an exceptional extent, and are then offered in extraordinary quantities, the Company is not chargeable with any violation of law because of its proving unable to respond at once to all calls, and to furnish cars as rapidly as shippers demand them.

Nor does it violate any law by refusing to allow its cars to be sent off its line to distant points when the business offered on its own line keeps them fully occupied.

Where by reason of extraordinary circumstances a railroad Company cannot promptly meet all calls for cars, it should furnish them ratably and fairly to all shippers, in proportion to the freights offered by them respectively, until the emergency has passed, and it is again enabled to move promptly all the freights tendered.

Upon the facts in this case the charge of unjust discrimination as between shippers and also between different classes of traffic, is held not made out.

BRAGG, *Commissioner* :

The complaint and answer in this proceeding present the following questions for our determination :

1. Whether, during the period commencing September 28, 1887, and ending October 12 of the same year, the Pittsburgh and Lake Erie Railroad Company, in violation of section 3

of the Act to regulate commerce, approved February 4, 1887, was guilty of giving an unlawful preference to other coal mines situated along that portion of its line known as the Pittsburgh, McKeesport and Youghiogheny railroad, by refusing to furnish their proportion of cars daily to the Rainbow Coal Company and the Lake Shore Gas Coal Company for shipments of coal to Buffalo, N. Y.

2. Whether, during the same period, the Pittsburgh and Lake Erie Railroad Company violated section 3 of the Act to regulate commerce by giving an unlawful preference to the coke trade in the region of country along its line by refusing to furnish box cars to the Rainbow Coal Company and the Lake Shore Gas Coal Company and other coal mines represented by complainants, for coal shipments, and furnishing the bulk of its box cars for the transportation of coke.

3. Whether, during the same period, the Pittsburgh and Lake Erie Railroad Company unlawfully discriminated against the Rainbow Coal Company and the Lake Shore Gas Coal Company and other coal mines represented by complainants by siding up coal cars or gondolas and converting them into cars suitable for the coke trade, in consequence of which the coal trade was made to suffer and languish.

4. Whether the Pittsburgh and Lake Erie Railroad Company failed to compel the various mills and furnaces located along its line to unload ore, limestone, and iron promptly from its cars, but allowed them to stand loaded for days at a time on their sidings, and thereby gave an unlawful preference in this matter to the undue and unreasonable prejudice and disadvantage of the Rainbow Coal and the Lake Shore Gas Coal Company, and other coal mines represented by complainants.

The evidence taken in this proceeding is very voluminous and so much of it is circumstantial in its nature that it would be difficult, if not impossible, to undertake to group the facts separately as they appear upon each of the above questions.

From this evidence we find the material facts to be, that the Pittsburgh and Lake Erie Railroad Company operates a line of Railroad from New Haven, in the State of Pennsylvania, to Youngstown, in the State of Ohio, a distance of 135.72 miles. That part of this line between Pittsburgh and New Haven is known as the Pittsburgh, McKeesport and Youghiogheny railroad, and its length is 56.95 miles, with branches, and it is operated under a lease for ninety-nine years, made January 1, 1884, to the Pittsburgh and Lake Erie Railroad Company, that company and the Lake Shore and Michigan Southern Railway Company guaranteeing six per cent. interest on the bonds and six per cent. dividends on the stock of the Pittsburgh, McKeesport and Youghiogheny railroad. The balance of this line operated by the Pittsburgh and Lake Erie Railroad Company is between Pittsburgh and Youngstown, Ohio. At Youngstown, Ohio, the Pittsburgh and Lake Erie Railroad Company connects with the Lake Shore and Michigan Southern Railway Company, which extends to Ashtabula, on Lake Erie. At Youngstown, the Pittsburgh and Lake Erie Railroad Company connects also with the New York, Pennsylvania and Ohio Railroad Company, which extends from Youngstown to Cleveland, Ohio.

On the 20th day of October, 1877, several contracts referring to and dependent upon each other were made by and between the Atlantic and Great Western Railroad Company, (now known as the New York, Pennsylvania and Ohio Railroad Company), the Pittsburgh and Lake Erie Railroad Company, the Youngstown and Pittsburgh Railroad Company, the Cleveland and Mahoning Valley Railroad Company, and the Lake Shore and Michigan Southern Railway Company. The first of these was a trust deed and stock subscription for the construction and completion of the Pittsburgh and Lake Erie railroad, through from Pittsburgh to Youngstown, and was signed by the several railroads named, and also by a large number of private individual subscribers to the stock. It is recited as part of this trust deed and contract of subscription, that among other objects had in view by the contracting railroads and the subscribers to the stock, in addition

to the construction and completion of the railroad from Pittsburgh to Youngstown, was that said railroad when constructed, "should never be consolidated with any of the leading railroad lines of the country nor leased to any of them, and that the same shall be forever conducted as an independent railway, and that the same should be so conducted and so managed, that all railroads connecting with it at Youngstown and elsewhere shall have the same facilities for conducting business over the same, into and out of Pittsburgh, and that no special favors, charges, or privileges shall ever be given to any railway or railways, and the said railway shall never be allowed to pass into the hands of any other railroad company or companies, nor in any way be subjected to the control, direction, or management of any other railway or officers thereof in such manner as to deprive the people of Pittsburgh and the stockholders of the said railroad company from the benefit which they would derive by way of competition and otherwise from said railroad being kept and maintained as a free and independent line and operated in the interest of and under the control of the stockholders." It also provides for the "making of a continuous independent line of railroad from Pittsburgh to Cleveland, and also to Ashtabula by way of Youngstown," to accomplish which it is recited that "contracts have been entered into for close running arrangements and the exchange of business between the Atlantic and Great Western Railroad Company and the Lake Shore and Michigan Southern Railway Company and the said Pittsburgh and Lake Erie Railroad Company, and the Youngstown and Pittsburgh Railroad Company, copies of which contracts are attached hereto and made a part hereof and marked A, B and C." These contracts providing for these close running arrangements and the exchange of business are before us and we have carefully examined them. Neither of them contain any provision that is in conflict with the right of the Lake Shore and Michigan Southern Railroad Company, and the Atlantic and Great Western Railroad Company to give directions as to the traffic in the hauling of which their cars shall be used, when furnished by either of them to the Pittsburgh and Lake Erie

Railroad Company *to be loaded and returned to points on their respective lines.*

Subsequently the Pittsburgh and Lake Erie Railroad Company by a lease, which is in evidence before us, and some of the terms of which have already been stated, acquired the right to operate the Pittsburgh, McKeesport & Youghioghenny railroad from the first day of January, 1884, for ninety-nine years. In this lease it is, amongst other things, provided that the Lake Shore Company shall at all times have the right to make such rates to and from competitive points reached by the road of the Pittsburgh and Lake Erie Company and the road of the said Pittsburgh, McKeesport and Youghioghenny Railroad Company as will enable it to compete with other roads for the same or similar traffic, but that such rates shall be so made and adjusted between the several lines on all business to or from the Youghioghenny Company's road on the same basis, three-fourths of one per cent. minimum ton per mile to the Pittsburgh Company, and so as in nowise, with reference to any traffic, to interfere with the rates and division of rates and the other provisions of a certain contract between the Pittsburgh Company and the Youngstown and Pittsburgh Railroad Company, of the first part, and the Lake Shore Company, of the second part, dated October 20, 1877.

Under these traffic arrangements the chief shipments of coal and coke over the Pittsburgh and Lake Erie Railroad Company is north and west from Pittsburgh, and are to Cleveland by way of the New York, Pennsylvania and Ohio Railroad from Youngstown, and to Ashtabula, on Lake Erie, by way of the Lake Shore and Michigan Southern Railway. There is also at certain seasons of the year a considerable shipment of coal to Buffalo, N. Y., over the Lake Shore and Michigan Southern Railway, though greatly less in amount than to Cleveland or Ashtabula, but this has not usually been done during the season when the navigation of the lakes is open, in the months of September and October, and up to the 20th of November. There are a great many furnaces and rolling mills along the line of the Pittsburgh and Lake Erie Railroad. From the time of the opening of the

Great Lakes for navigation, which usually occurs about the first of May, until navigation is closed upon them, which usually occurs about the 20th of November in each year, there is an immense shipment of coal and coke over the Pittsburgh and Lake Erie Railroad to Youngstown for Ashtabula and Cleveland, and from these ports this coal and coke are transported to other points. A great deal of this coke is used in smelting ore at the furnaces and mills along the line of the Pittsburgh and Lake Erie Railroad and its connections, the Lake Shore and Michigan Southern railway and the New York, Pennsylvania and Ohio railroad. The cars which transport this coal and coke to the ports of Ashtabula and Cleveland in great part are promptly loaded with return loads of ore from the Lake Superior mines to Pittsburgh, Bessemer, and other points where there are mills and furnaces along the lines of the Pittsburgh and Lake Erie railroad. A car-load or train-load of coal or coke, as the case may be, leaves points on the Pittsburgh and Lake Erie railroad one day, and the next day thereafter it is in Ashtabula or Cleveland, as the case may be, and unloaded, and the following day it is back again at Pittsburgh or Bessemer with a return load of ore from Ashtabula or Cleveland. If the same cars should carry loads of coal from points on the Pittsburgh and Lake Erie railroad to Buffalo, they would, under the best connections usually made, be gone from their line for a period of at least a week—more frequently ten days, and often two weeks. From this it has resulted that an average of ten cars with coal go over the Pittsburgh and Lake Erie railroad to Ashtabula and fifteen to Cleveland, as the case may be, where one of such cars goes to Buffalo. The interchange of business between the Pittsburgh and Lake Erie and the New York, Pennsylvania and Ohio railroad is much larger than that between the Pittsburgh and Lake Erie railroad and any other connecting road. The bulk of the business of the Pittsburgh and Lake Erie railroad is north and west, but it also interchanges business with the Pennsylvania and the Baltimore and Ohio railroads for points south and east. The trade between Buffalo and Pittsburgh over the Pittsburgh and Lake Erie railroad

is principally heavy freights from the canal and some merchandise. This heavy freight consists chiefly of rails, billets, blooms, and wire rods.

During the period in which the complaint is made the Pittsburgh and Lake Erie Railroad Company had an equipment consisting of 931 gondola coal cars, 404 box cars, and 404 coke cars; and in addition to this, 100 flat cars, one box car, thirteen coke cars, and 150 coal cars, used on that portion of the road known as the Pittsburgh, McKeesport and Youghiogeny railroad. This was a larger equipment than this road ever had before. The gondolas were for the business of coke and coal, and most of them were used in the Cleveland traffic. They are open cars with siding. Box cars are sometimes used for hauling coal or coke long distances, though this is not the case when such cars are new, and gondolas are rarely used for hauling coal or coke long distances. Generally the coal business is a little larger on the Pittsburgh and Lake Erie railroad than the coke business. The bulk of the coke trade is done in foreign cars—that is, cars of the Lake Shore and Michigan Southern railway and the New York, Pennsylvania and Ohio railroad, and the Cleveland, Columbus, Cincinnati and Indianapolis railway. The bulk of the equipment of the Pittsburgh and Lake Erie railroad is used for its local business between New Haven and Youngstown.

Prior to the first of September, in the year 1887, and, indeed, up to the middle of that month, it is not shown that complaint had been made of an insufficiency of cars for the coal and coke trade along the line of the Pittsburgh and Lake Erie railroad. There had been a strike among the laborers at the coke mines along its line, which commenced in May, 1887, and lasted until July of that year, and during that period the coke mines had done but little work; but the laborers of the coke mines very generally resumed work in August, and from that time on there was a large output from these mines. From the upper lakes there were exceedingly high rates and an unusually large business for the boats during the summer and fall of 1887. These vessels demanded high rates on coal and coke, which the coal and

coke men refused to pay, and in this way there was a stand-off between them for a period of two or three months, during which time the vessels returned empty from Ashtabula and Cleveland to the upper lakes. These vessels were not owned or controlled by these railroad companies. At last, and during the latter part of September, the coal and coke men yielded to the rates of the vessels, and then there was a general rush for cars for coal and coke, crowding a volume of shipments of these articles over the Pittsburgh and Lake Erie railroad, which should naturally have been, in the regular course of business, distributed over a period of four months, into a period of as many weeks. There was a much greater demand than usual for coke for the Lake Superior region as well as for the furnaces and rolling mills along the Pittsburgh and Lake Erie railroad. The Lake Superior mines shipped 4,400,000 tons of ore during the season of 1887 against 3,400,000 tons for the previous year, and that resulted, of course, in a larger consumption of coke to smelt this ore. It also made much greater demands than ever before on the Pittsburgh and Lake Erie railroad for cars to bring this ore from Cleveland and Ashtabula to Pittsburgh, Bessemer, and the mills and furnaces along the Pittsburgh and Lake Erie railroad. Shipments in business of every other class during this time were also very heavy. The Pittsburgh and Lake Erie railroad has but a single track. There was enough business to have kept employed during this unprecedented rush of business more than double its number of cars, operated upon two tracks instead of one. The Lake Shore and Michigan Southern railway furnished about 600 freight cars to aid the Pittsburgh and Lake Erie Railroad Company in this crisis. The New York, Pennsylvania and Ohio Railroad Company, from some cause, which the evidence does not explain, was unable to aid the Pittsburgh and Lake Erie Railroad Company with as large a number of cars as it had theretofore done during the months of September and October, 1887. The daily capacity of the Pittsburgh and Lake Erie road from Pittsburgh to Youngstown is about 600 freight cars, and the evidence shows that from the middle of September to the middle of

October, 1887, it was worked to its utmost in the transportation of freight over that portion of its line, and that with all the cars it received from its connecting lines added to its own there was, what is called in railroad transportation, "a car famine," and it could give to the mines along the line of its road not more than about half what they required for the transportation of coal and coke. This condition of affairs lasted until the close of navigation in the lakes, about the 20th of November, after which time there were plenty of cars for all purposes, except, perhaps, coke.

While this condition of affairs was existing in Pennsylvania and Ohio along the line of the Pittsburgh and Lake Erie railroad and the Lake Shore and Michigan Southern railway, extending to Ashtabula, and the New York, Pennsylvania and Ohio, extending to Cleveland from Youngstown, there was what is known as a coal blockade at Buffalo, N. Y., and the cars of the Pittsburgh and Lake Erie railroad and the Michigan Southern railway, carrying coal to Buffalo, were detained on the sidings there from two to three weeks before they were returned to the line of the Pittsburgh and Lake Erie railroad, and in consequence of this stringent orders were issued by the chief officers of the Pittsburgh and Lake Erie and the Michigan Southern against having any of their cars loaded for Buffalo from points along the Pittsburgh and Lake Erie railroad, the object of this being to keep their cars at home along their own line for the great and unprecedented work that was before them in transporting the coal and coke to Ashtabula and Cleveland, and to the mines and rolling mills along their lines, and in bringing the ore back from Cleveland and Ashtabula to these points, as well as in keeping their general merchandise freight moving. It was during this period that complainants had contracts for the delivery of coal from the mines they represented, namely, the Rainbow Coal Company and the Lake Shore Gas Coal Company, for delivery at Buffalo, N. Y., where the price of coal was slightly higher than at Ashtabula or at Cleveland, and it is in regard to this that their complaint is made: that they were not furnished with their proportion of cars upon application made by them to

the Pittsburgh and Lake Erie Railroad Company for this purpose. The evidence does not show that any other person applied to the company for coal cars to Buffalo during this period, although it does show that it refused to allow its coal cars to go there for any shipper during this period on account of the facts herein stated. The distance from Youngstown to Buffalo, by the Lake Shore and Michigan Southern railway, is 191 miles, and from Youngstown to Ashtabula, by the same line, is 62 miles; the distance from Youngstown to Cleveland, by the New York, Pennsylvania and Ohio railroad, is 67 miles.

The manner in which cars are furnished for coal shipments to the mines is upon requisition made by the mines for so many cars per day. These requisitions frequently call for more cars than the mines actually need, and it would appear that this was done out of abundant caution on the part of the mines that they might have a sufficiency of cars for their purposes, but it would have resulted in some mines obtaining more than they needed and others less than they were entitled to if it had not been controlled, as far as could be done, by the railroad company using a vigilant discretion in supplying the mines according to their actual output daily, instead of according to their requisitions. It is but proper to state that the Rainbow Coal Company and the Lake Shore Gas Coal Company and the other mines represented by complainants are not shown by evidence to have been guilty of having made any such exaggerated requisitions, but others did, and the company was put upon the exercise of a vigilant discretion in all its dealings of this character from the causes named. The custom is for the furnace to furnish its own siding. If the furnaces do not unload the ore and coal promptly it is done by the railroad company, and demurrage is charged without preference. The rule of the company is to allow twenty-four hours of daylight for the unloading of a car by the furnaces. In some instances, where the consignees of freight to be delivered were not at fault, the company did not charge demurrage, but these were exceptional.

Wherever cars were furnished by the Lake Shore and

Michigan Southern to the Pittsburgh and Lake Erie railroad or by the New York, Pennsylvania and Ohio railroad, or by the Cleveland, Columbus, Cincinnati and Indianapolis railway, the rule was that they were furnished under instructions or directions as to the freight with which they were to be loaded for return to those lines, though not as to the shippers by name personally who were to be served, and the Pittsburgh and Lake Erie loaded these cars thus furnished and returned them in the manner indicated by these instructions or directions. Various causes frequently caused delay in loading cars at the mines, even when coal was on hand for that purpose. If a miner died the miners all went out and the mine stopped for the time being. If there was a break in the machinery in shifting the engines, putting the cars into the mines or in unloading them, this caused delay. The mines were not arranged for loading box cars, because their chutes were not made for that purpose. The Lake Shore Gas Coal Mine could load box cars by shoveling, but the Rainbow Coal Mine could not do so in September and October, 1887. Amongst other methods resorted to by the railroad companies to compel the furnace men, mill men, and mine men to load or to unload cars promptly was that of "shutting them off," as it was called—that is, refusing to give them more cars until they had loaded or unloaded, as the case may be, the cars they had—and this seems to have been resorted to very frequently during last summer and fall by the Pittsburgh and Lake Erie Railroad Company and its connecting lines, the Lake Shore and Michigan Southern and the New York, Pennsylvania and Ohio Railroad Companies. During the pressure for the shipment of coke it appears that the Pittsburgh and Lake Erie Railroad Company found it necessary to side-up coal cars or gondolas, as they are called, for the use of the coke trade, but, as already stated, these are cars which can be used either for the coal or coke trade.

The Pittsburgh and Lake Erie Railroad Company produced in evidence all its billing books and car-moving records during the period to which the controversy relates. Its president, superintendent, general manager, freight agent,

and master of trains were each examined as witnesses at length, answering, so far as we could see, fully and unreservedly all the questions propounded to them, and each testified that in the shipment of freights and distribution of cars that he had given no preference and knew of none that had been given by the company or any of its agents to any shipper over any other shipper concerning any of the matters involved in this complaint, and there was no evidence that contradicted them in these respects.

The conclusions we have reached upon this evidence and the reasons therefor only remain to be stated.

1. The first ground of complaint is that the Pittsburgh and Lake Erie Railroad Company, during the period commencing September 28, 1887, and ending October 12 of the same year, violated section 3 of the Act to regulate commerce, approved February 4, 1887, by giving an unlawful preference to other coal mines situated along that portion of its line known as the Pittsburgh, McKeesport and Youghiogeny railroad in not having furnished their proportion of cars daily to the Rainbow Coal Company and the Lake Shore Gas Coal Company for shipments of coal to Buffalo, in the State of New York.

By what construction the evidence in this proceeding could be held to sustain the charge we are unable to perceive. The Pittsburgh and Lake Erie railroad is a local, interior road, with its termini at New Haven, in the State of Pennsylvania, and Youngstown, in the State of Ohio; and it does not extend to Buffalo. The Pittsburgh and Lake Erie Railroad Company was not then permitting any of its coal cars to go to Buffalo for reasons which were sufficient and in no way in conflict with either the spirit or letter of any of the provisions of the Act to regulate commerce. These reasons were that on account of causes, for which it was in no sense responsible and for which it could in no way be justly blamed, it then had more work than it could possibly do in transporting freights over its own line, and if it had permitted its coal cars to go to Buffalo with coal for these two mines it would have resulted in these cars being absent from its line for certainly one week and more probably ten days or

two weeks, according to the evidence, and it would have thereby rendered itself less able to serve all the business over its line. If complainants had a right to insist that this company should send its cars at such a time with coal to Buffalo, then every other coal mine on its line had the same right, and this would have stripped this railroad of its equipment, leaving the other business along its line to go to ruin, but none of them had any such right. The company had its legal duty to perform. Its first and most paramount legal duty to the shipping public was to make its entire freight equipment do its utmost in serving the shippers along its own line. For this purpose, amongst others, it had been chartered by the States of Pennsylvania and Ohio, and for this purpose, chiefly, it had been constructed by those who had furnished their means in subscribing to its stock. If between the 28th of September, 1887, and the 12th of November following, when, as shown by the evidence, this railroad company was unable by its utmost efforts, with all of its freight equipment added to that of the freight cars supplied to it by its connecting lines, to move promptly more than one-half of the freights as fast as they accumulated along its line, it had furnished coal cars to the mines of the Rainbow and Lake Shore Gas Coal Companies to ship coal to Buffalo in order that they might obtain a better price for it than other shippers along its line were receiving at Cleveland and Ashtabula, and this, too, when it was refusing cars to all other shippers of coal to Buffalo, thus giving to complainants this exceptional advantage, it is quite possible that it would have been guilty of a violation both of the letter and spirit of section three of the Act to regulate commerce. Under such circumstances the legal duty of this railroad company was, as the evidence shows it did, to operate its cars so as to keep them as much as possible on its line and confined to the business of its line. If, in that crisis, it could not furnish sufficient cars to all the shippers along its line for the amount of their freight, then it was its duty to have done what is shown by the evidence it did, and this was to fairly endeavor to furnish its cars to shippers of coal in proportion to their shipments

over its line upon a basis that was relatively and substantially just.

While these shippers all complained, as was to be expected from men whose business was no doubt suffering, that they did not have as many cars as they needed to ship their coal and coke as fast as they were ready to ship it, yet it is but fair to presume that as intelligent men they were generally sufficiently cognizant of the fact to know that this railroad company was not to blame for the excessive volume of freights that had been held back during the summer and early fall on account of the high rates of vessels on the lakes, and then at the last moment had been rushed in upon it to be transported over its line. This railroad company did not own any of those vessels or have any control over them, and, as for that matter, the evidence does not show that any of those vessels were owned or controlled by any of its connecting lines. Neither this company, therefore, nor any of these railroad companies, are shown by the evidence to have been interested in or responsible for the high rates charged by these vessels. In the light of the evidence, it is also but fair to presume that these shippers knew the unprecedented volume of freights that the company was obliged to transport to the mills and furnaces at Pittsburgh, Bessemer, and other points along its line, coming by way of Youngstown from Cleveland and Ashtabula. These shippers must have known, and so did the company, that at the utmost this crisis would end when navigation closed on the lakes, about the 20th of November, and that then there would be plenty of cars for all.

The Lake Shore and Michigan Southern Railway Company, and the New York, Pennsylvania and Ohio Railroad Company are not parties to this proceeding. The complainants in developing their case were permitted to show in evidence the traffic arrangements existing between these two companies, and the Pittsburgh and Lake Erie Railroad company, for the purpose of throwing all the light that this would do, if any, upon the matters involved in their complaint. It appears from this evidence that during the period to which this complaint refers, as well as prior to that time,

that the Lake Shore and Michigan Southern Railway Company, the New York Pennsylvania and Ohio Railroad Company, and the Cleveland, Columbus, Cincinnati and Indianapolis Railway Company occasionally sent their cars from their lines to points on the Pittsburgh and Lake Erie Railroad, with instructions or directions to be loaded with certain kinds of freight designated and returned to points on their lines, respectively. The right of these companies to do this was not questioned on the hearing by the counsel for complainants, except only as it was made the means of unjust discrimination, if any, by the Pittsburgh and Lake Erie Railroad Company against the complainants in the shipment of their freight. The evidence does not show that it was productive of any such unjust discrimination against plaintiffs or any other shippers. Such cars were sent for designated traffic and not to designated persons, and the effect of it was to enure to the benefit of all shippers along the line of the Pittsburgh and Lake Erie Railroad Company by enabling that company the better and more promptly to move their freight.

The inability of this company to furnish complainants instantly upon demand all the cars they needed for shipment of coal from the mines they represented, resulting from the causes and in the manner shown in the evidence, was not subjecting them "to any undue or unreasonable prejudice or disadvantage in any respect whatever" within the meaning of section 3 of the Act to regulate commerce. The vast fluctuations and unforeseen developments of commerce or the fault or misfortune of some one or more connecting lines may occasionally bring about a condition of affairs in which the best managed railroad, and with the most ample freight equipment, is unable to move at once as promptly as tendered all the freight upon its line, and this without any fault of its own. There is no evidence that the freight equipment of the Pittsburgh and Lake Erie Railroad Company had been unequal to the business of the previous season, and yet in the season the latter part of which is complained of it appears, in the exercise of good faith and prudent preparation in the line of its duty, to have

increased its freight equipment over what it had been in the previous season, and to have kept it well in hand upon its own line for the movement of the freight of that line; and, in addition to this, it had a right to rely and did rely upon its arrangements with the Lake Shore and Michigan Southern Railway Company, and the New York, Pennsylvania and Ohio Railroad Company for cars. It certainly is the duty of every railroad company to provide itself with a sufficient freight equipment and to keep this well in hand for the prompt movement of freight over its line, based upon known and probable estimates of the business of a season. This the Pittsburgh and Lake Erie Railroad Company seems, from the evidence, to have done; but when an immense volume of local freight was held back by shippers for several months, and then precipitated upon them by this carrier, all at once, it could not furnish all the cars thus demanded for the instant movement of this mass of accumulated freight. It did, however, do all in its power to move this freight as quickly as possible. This was no violation of the third section of the Act to regulate commerce.

II. The second ground of complaint is, that from the 28th day of September, 1887, to the 12th day of October next following, the Pittsburgh and Lake Erie Railroad Company violated section 3 of the Act to regulate commerce by giving an unlawful preference to the coke trade in the region of coke along its line, by refusing to furnish box cars to the Rainbow Coal Company and the Lake Shore Gas Coal Company and the other coal mines represented by complainants, and by furnishing the bulk of its box cars for the transportation of coke.

It appears from the evidence that there was a strike among the coke miners about the 1st of May, 1887, which lasted until July of that year, and that they resumed work generally and actively in the month of August. At that time there was a great demand for coke in smelting ore from the Lake Superior mines and in the rolling-mills and furnaces along the line of the Pittsburgh and Lake Erie Railroad Company. These rolling mills and furnaces were running

day and night, and it required all that the coke beds and the Pittsburgh and Lake Erie Railroad Company could do to furnish them with coke. The only refusal to furnish box cars to the Rainbow and the Lake Shore Gas Coal Companies appears to have been, as we have already seen, to transport coal to Buffalo. In other respects they appear to have received their proportion of cars for shipments of coal from the mines. Box cars are used exclusively for hauling coal only in cases of long hauls, and are far better adapted to the transportation of coke than coal. The hauls of coal or coke from the line of the Pittsburgh and Lake Erie Railroad during this season were short hauls. The coal mines along this road had no chutes to load box cars with coal, and this, the evidence shows, was true of the mines of the Rainbow Coal Company and the Lake Shore Gas Coal Company during the time to which this complaint relates. There is a strong preponderance of evidence to the effect that the bulk of the box cars of the Pittsburgh and Lake Erie Railroad Company, during the time complained of, were not used in transporting coke, but were used chiefly in transporting general merchandise over its line. This ground of complaint, therefore, is not sustained by the evidence.

III. The third ground of complaint is that the Pittsburgh and Lake Erie Railroad Company, in violation of section 3 of the Act to regulate commerce, unlawfully discriminated against the Rainbow Coal Company and the Lake Shore Gas Coal Company and other mines represented by complainants by siding up coal cars or gondolas and converting them into cars suitable for the coke trade, in consequence of which the coal trade was made to suffer and languish.

The evidence shows that the coal and coke trades are nearly equal in amount, there being slightly more of coal, and that the number of cars required for each is not largely different; and, further, that what are known as gondolas or open flat cars sided up are equally as serviceable in the transportation of coal as of coke. We find from the evidence that the company had been siding-up or converting into gondolas a considerable number of its open flats, and that these could be

used as well for the coal trade as for the coke trade. The evidence is that ever since navigation closed on the lakes, about the 20th of November, and while there are plenty of cars for all else, there is still a shortage in the supply of cars for the coke trade. This itself is a sufficient reason, if there were no other, why the company should prepare additional cars for the coke trade. The evidence does not sustain the charge that from the cause complained of the coal trade is languishing.

IV. The fourth or last ground of complaint is that the Pittsburgh and Lake Erie Railroad Company has failed to compel the various furnaces and mills located along its lines to unload ore, limestone, and iron promptly from its cars, but allows these cars to stand loaded for days at a time on its sidings, thereby giving an unlawful preference in the use of these cars to the undue and unreasonable prejudice and disadvantage of the Rainbow and Lake Shore Gas Coal Companies and other coal mines represented by complainants.

We find from the evidence that not only the mills and furnaces located along the line of the Pittsburgh and Lake Erie railroad sometimes detain its cars longer than necessary, rarely for more than two or three days at a time, but that other shippers have also detained its cars occasionally in the same manner when they should have been more promptly unloaded. This is proved, however, in every instance to have been done against the orders and instructions and wishes and interest of the railroad company. That company appears to have done all in its power to enforce the prompt unloading of these cars by making a rule that twenty-four hours of daylight, and no more, should be allowed for the unloading of its cars, and when more than this was taken, unless good excuse was shown for it on the part of the consignee, demurrage was charged. Besides charging this demurrage, it is shown by the evidence the company used all the means it could to have its cars unloaded as promptly as possible. The chief instance relied upon by the complainants, of cars standing on the siding near

McLaughlin's, in Pittsburgh, is satisfactorily explained and accounted for by the company, and it was shown that the company was not at fault and was not guilty of giving any preference in that case. It frequently happens that the cars of a railroad company are occasionally kept too long by shippers, but as every case of this kind is clearly against the interest of the railroad company, to show that a preference was thereby given to such shipper a party complaining would have to introduce evidence which would show that no demurrage was charged or that no proper efforts were made by the railroad company to have the freight loaded or unloaded more quickly. In this proceeding the evidence shows that the railroad company did all in its power to have its cars loaded and unloaded promptly upon sidings and by consignees. It frequently went to the extent of shutting off mines and mills because they did not load and unload its cars promptly. This ground of complaint is, therefore, not sustained by the evidence.

According to our conclusions above stated, the complaint in this proceeding is not sustained by the evidence. It is therefore dismissed.

THOMAS J. REYNOLDS,

v8.

WESTERN NEW YORK AND PENNSYLVANIA RAIL-
WAY CO. AND G. CLINTON GARDNER, RECEIVER OF
THE BUFFALO, NEW YORK AND PHILADELPHIA RAIROAD CO.

Tried December 7, 1887; decided January 13, 1888.

Classification of railroad ties should correspond with that of other rough
lumber. Raising of same from sixth to fifth class unjustifiable.

Rates established by a common carrier in order to keep upon its line mate-
rial for which the road has use, or to keep the price low for its own ad-
vantage, cannot be justified.

Producer of railroad material is entitled to sell it when he wishes, in the
best available market. Common carriers are forbidden to attempt to
prevent this by applying disproportionate or unreasonable rates.

Special classification of lumber should be extended to railroad ties at the
points in question.

E. A. Nash, for complainant.

Geo. Zubriskie, for defendant.

REPORT AND OPINION OF THE COMMISSION.

WALKER, *Commissioner* :

Complaint of alleged unreasonable and unjust charges for
the transportation of railroad ties. The answer asserts that
the charges complained of are reasonable and just.

The following facts are found from the proofs :

The railroad in question extends from Rochester, N. Y.,
southwesterly through Olean and Salamanca into the State
of Pennsylvania. It connects at Rochester with the New
York Central and the West Shore railroads, at Olean with the
Delaware, Lackawanna and Western, and at Salamanca with
the New York, Lake Erie and Western. It was formerly
owned and operated by the Buffalo, New York and Phila-
delphia Railroad Company. In actions brought in the
United States courts of New York and Pennsylvania to fore-
close a mortgage upon the property of that company, G.
Clinton Gardner was appointed receiver May 20, 1885, and
has since operated the property of said company as such re-

ceiver. A new company has recently been organized under the foreclosure, entitled the Western New York and Pennsylvania Railway Company. It is expected that said receiver will surrender possession to the latter company about January 1, 1888. The last-named company and said receiver are the parties defendant in this proceeding.

Complainant is a manufacturer of lumber in the State of Pennsylvania, having an office at Rochester, N. Y. He owns several thousand acres of timber land near the line of said railroad, in the vicinity of Corydon, Pa.

Corydon is distant 20 miles from Salamanca, 39 miles from Olean, and 147 miles from Rochester.

For several years complainant has been engaged in manufacturing lumber in Northern Pennsylvania upon the line of said railroad and of the Buffalo, Rochester and Pittsburgh railroad, most of which has found a market in the State of New York. Much of his timber is oak, of which the trunks are sawn into squared lumber and boards, and the smaller trees, pieces, and large branches manufactured into railroad ties, both sawn and hewn. He also manufactures ties to some extent from chestnut and hemlock. The purchasers of his ties have been the railroad companies above named, and other roads reached over said intersecting lines through Salamanca, Olean, and Rochester.

Prior to June 15, 1887, the classification in use upon this road, as well as upon other roads in the vicinity, nominally placed lumber in the sixth class, in which railroad ties were included, though not specially named. Lumber, however, being an article of merchandise of considerable bulk in proportion to its value and in respect to which keen competition is met among producers, has for a long time been specially treated, forming practically a class by itself, and receiving very low and special rates; and this practice continues to the present time.

Upon this road lumber and ties were formerly shipped for complainant at identical rates. About February, 1886, the price charged for transportation of ties was greatly increased, so that complainant ceased their shipment for a time. Upon the taking effect of the Act to regulate commerce the charges

upon ties and the method of collecting the same were so adjusted that his manufacture and shipment thereof were resumed. On July 15, 1887, what is known as the "official classification No. 2" became operative, and was adopted by the defendant in common with the other roads north of the Ohio and east of the Mississippi. In this classification lumber in car-load lots is in class 6; in less than car-load lots, class four. Railroad ties in car-load lots are in class five; in less than car-load lots, class four. It was the only form of rough lumber which was raised to class five in car-loads.

Defendant has continuously maintained its low special rate upon lumber without regard to its being classified in the sixth class, but insists upon the regular fifth-class tariff rate for railroad ties. There have existed some other apparent irregularities which have presented themselves to complainant's mind as matters of grievance, arising in part from the fact that special rates were given him prior to the enactment of the Act to regulate commerce, in part from a misunderstanding about pre-payment of freight, and in part from the fact that after the act became operative the agents of the railroad company at points of shipment failed to conform to the instructions furnished them in respect to ascertaining actual weights, but at times allowed complainant to load cars very heavily, paying only the price of twelve tons, in respect both to lumber and ties. This irregularity was first corrected as to ties, while allowed to continue for a time in regard to lumber. The defendant's rule in this respect has not been consistently enforced, but the reasonableness of the rule, involving the propriety of charging for actual weight in all cases, is not seriously contested.

The results of the tariffs now enforced by defendant from Corydon are as follows :

	To Salamanca.	To Olean.	To Rochester.
Lumber, special, per ton.	\$0 60	\$0 60	\$1 10
Sixth class.....	1 00	1 60	2 30
Fifth class (ties).....	1 20	2 00	2 70
Oak ties (each).....	13	20	27
Oak ties, at lumber rates, would be each.....	06½	06	11

A switching charge of \$1.13 per car is made at Salamanca upon all cars delivered to the Erie road by defendant. Oak ties weigh about 200 pounds each.

The special rates made by defendant on lumber, as shown by its tariffs on file in the office of the Commission, include rough timber, boards, staves, headings, hoop poles, hoops, shooks, hemlock bark, lath, shingles, cordwood, and piling.

Prior to the adoption of the official classification No. 2, July 15, 1887, the special rate upon lumber was treated by railroad companies as including ties. So far as the proof before us shows, this was general, except in the case of this defendant; which, as above stated, about February, 1886, refused to treat ties as included in the special lumber class, and exacted regular sixth class rates, afterwards raised to fifth class; the reason given by the general superintendent therefor being that he "didn't want the ties to go off from the the road."

Upon these facts the case presents two questions:

First. Is the distinction in the "official classification No. 2" just and reasonable, by which railroad ties are placed in class five and other lumber in class six?

Second. Is it just and reasonable that defendant should exclude ties from the low special rate charged upon coarse lumber in other forms.

No suggestion was made upon the hearing of any sound reason by which the raising of ties to the fifth class in the new classification can be justified. Defendant's general freight agent endeavored to make out a case of greater cost by saying that "tie shipments are less in quantity and require switching for single cars, whereas in the case of lumber we switch a large number of cars together." This statement is not at all convincing, in view of the fact that defendant has from six to seven thousand ties now awaiting shipment, and in August last had from forty to fifty men engaged in their manufacture. Lumber shipments from a mountain siding are not often made by the train-load, and no special reason appears in the evidence why tie shipments are not likely to be as large per day as lumber shipments. Ties are

purchased by railroad companies who use them in large quantities. They are shipped by manufacturers, who in that way use up material not adapted to the manufacture of lumber; the product must quite nearly approximate the lumber product from oak timber, taking the growth, small and large. Complainant testifies that his tie product considerably exceeds his lumber product on the same acreage.

Defendant's general freight agent further said that he "could think of nothing else that would make any difference in the cost of hauling a given number of cars of ties as compared with an equal number of cars of lumber." The distinction cannot be sustained on the ground of greater cost of movement, for no such greater cost is established.

An examination of said official classification No. 2 shows that other coarse products of the forest are placed in class six, viz., boards, timber, box-stuff, hoop poles, lath, logs, piles, shingles, staves, telegraph poles, wood pulp, and empty boxes. Railroad ties from oak timber, which cost for sawing or hewing about 25 cents each, or \$2.50 per ton, are no more expensive to manufacture than the above articles; there is no special risk attending their transportation; their value is less per ton than that of most of the articles above enumerated; they naturally arrange themselves with the articles placed in class six.

On the contrary, class five, as now constituted in the official classification, contains a line of articles which do not at all correspond with railroad ties in the characteristics which influence classification. The following list enumerates the various articles manufactured from wood, found in class five, in car-loads: Axles, balusters, stair rails and other turned work, barrel covers, patent fruit barrels, base-ball bats, brush blocks, butchers' blocks, ironing boards, ox bows, telegraph brackets in bags or boxed, bread boards in boxes or crates, bridge material, broom handles, buckets nested, bungs or plugs, butter ladles, molds and plates, churns, cigar-box lumber, curtain rollers and slats, dye-woods in boxes or barrels, excelsior in bales, wooden fence in sections, blind frames, chair-stuff, table leaves, legs, etc., boxed or racked, wooden gates, horse-pokes, step-ladders, last-blocks, meas-

ures, moldings, oars, pails, paneling and wall-scotching, plane bodies, potato-mashers, pumps and tubing, towel-racks, rolling pins, scale-boards, flour scoops, bench screws, sieves, steak-pounders, stove boards, cigar-lighters, croquet sets, shoe-pegs, sash, skewers, farm wagons, bob sleds, hubs, neck yokes, wagon material, wagon wheels, wheelbarrows, Indian clubs, tubs, tooth-picks. It requires no argument to prove that the placing of railroad ties in the same category with these articles is neither reasonable nor just. The mere fact that it is so found is sufficient of itself to suggest that it was placed there for some purpose not readily apparent and different from the reasons which ordinarily influence classification. No valid excuse for the discrimination being shown, the Commission are of the opinion that the classification of railroad ties in car-loads should be reduced to that of lumber.

The question whether or not railroad ties should receive the special lumber rate involves other considerations. Defendant's position respecting the low rate placed upon lumber is that the lumber rates are too low to afford a reasonable compensation to the carrier, and that they are made to meet the competition of lumber brought from other directions over their roads, and are necessary in order to enable defendant to do any lumber business at all, the rates to Rochester in particular having been reduced on September 1, 1887, from \$1.25 to \$1.10 per ton for that very reason; and it is claimed that no such fact exists in regard to ties, which do not meet the same competition, and can properly be charged a higher rate of transportation.

The special lumber rate from Corydon to Salamanca, 20 miles, is \$12 per car of twenty tons, which is said to be about the usual car-load weight, or 3 cents per ton per mile; to Olean, 39 miles, \$12 per car, or 1½ cents per ton per mile, and to Rochester, 147 miles, \$22 per car, or 7½ mills per ton per mile.

No proof has been made of any competition which meets Pennsylvania lumber at either Salamanca or Olean, nor is it apparent that the rates to those points are inordinately low. At Salamanca the rate of 60 cents per ton cannot with

justice be claimed to be exceptionally low upon a product of the character of lumber. To charge double that rate upon ties, or \$24 per twenty-ton car plus \$1.13 switching charge, making \$25.13 for a haul of 20 miles, is not relatively reasonable and just, especially in view of the fact that the value of the lumber at Salamanca would be about \$176 and of the ties about \$110.

The car-load rate to Olean on lumber remains at \$12 and on the ties is increased to \$40.

The present lumber rates to Salamanca and Olean are of long standing, having been originally given to complainant as a special rate, and announced as the public rate upon the passage of the Act to regulate commerce.

As complainant in his testimony distinctly states that Rochester is not now a tie market, no order will be made at present in respect to that point.

The circumstance cannot escape observation that the only possible purchasers of railroad ties are railroad companies. It is also obvious that the value of ties at Corydon is their selling price at Salamanca and Olean less the freight. Therefore the higher the freight, the less the value of the ties at Corydon. The defendant itself is a purchaser of ties; it bought a lot of complainant in 1886. The ordinary conflict of interest between the railway and the shipper is here intensified by the fact that the direct interest of the carrier requires the cheapening of the shipper's product. It was candidly admitted by its general superintendent that this consideration influenced the conduct of defendant in fixing its rates upon ties at a time when its interstate rates were not subject to control under a law of Congress. But if this was legal then, it is so no longer. It involves and implies extortion. It is not only repugnant to every man's sense of propriety and justice, but it is directly forbidden and made illegal by the third section of the Act to regulate commerce, in that it subjects this particular description of traffic to undue and unreasonable prejudice and disadvantage for the pecuniary benefit of the carrier itself. It is a course of dealing if possible even more obnoxious to the just provisions of the act than would be a tariff arranged in the same manner

for the purpose of giving a preference to another shipper competing from another direction in the same market.

Rates established by a common carrier under the influence of a desire to keep upon its line a material for which the road itself has use, or to keep the price thereof low for its own advantage, cannot be justified either in morals or in law. Every party who produces such a material is entitled to sell it when he wishes, in the best available market, and the common carrier has no right to prevent his doing so by disproportionate or unreasonable rates. This the defendants in the present case have been attempting to do.

The order of the Commission will be that the defendants cease and desist from charging a greater price for the transportation of railroad ties from points in Pennsylvania to Salamanca and to Olean, in the State of New York, than is charged for the transportation of lumber at the same time between the same points.

B. S. CREWS, *et al.*, COMMITTEE, ETC., v. THE RICHMOND & DANVILLE RAILROAD COMPANY.

Heard November 14-15, 1887.—Decided February 15, 1888.

It is not a ground of complaint against a railroad company that it equalizes its rates as between small and large towns, even though the effect may be prejudicial to the large towns, which before had been specially favored.

The spirit and purpose of the Act to Regulate Commerce requires that when the circumstances and conditions will fairly admit of it the charges to all points for a like service should be made relatively equal.

When the reasonableness of rates is in question, the charges made on long through lines cannot, for reasons which are stated in the opinion, form a just basis for comparison with local rates for relatively short distances.

A carrier is not made responsible for rates made by a connecting road because merely of its giving them in connection with its own rates to parties desiring to make through shipments.

A carrier is not compellable by law to give to the merchants of a town on its line the privilege of shipping their goods from the point of purchase to their own locality, and again from thence to the place at which the goods may be sold by them at the same rate which would have been charged had there been but one shipment from the point of purchase to the point of ultimate delivery.

The fact that a refusal to give the through rate as for one shipment, operates prejudicially to the town desiring the privilege and favorably to another town, does not make the refusal operate as unjust discrimination when the carrier applies the same rule to all towns and accords the privilege to none.

Discrimination must consist in the doing for or allowing to one party or place what is denied to another ; it cannot be predicated of action which in itself is impartial.

Hon. G. C. Cabell, for complainant.

J. T. Worthington, Esq., for defendant.

COOLEY, *Chairman* :

The original petition in this cause was framed with great care and precision, and in nine distinct paragraphs set forth separate grounds of complaint, which were averred to constitute violations by defendant of the Act to Regulate Commerce. For the purposes of an adjudication the following summary of the allegations will suffice :

After appropriate prefatory statement it was alleged—

First. That the defendant, through combination and

arrangements with connecting lines of railroad north and west, has charged and continues to charge the people, merchants and tradesmen of Danville, Va., and adjacent country, a greater price for the handling and transportation of their goods and merchandise purchased in New York, Philadelphia, Baltimore, Chicago, Cincinnati, Mansfield, Ohio ; Grand Rapids, Mich.; St. Louis, Mo., and other places than the said railroad charges other persons and localities under like conditions and for similar services.

Second. That the defendant for some time past has discriminated and continues to discriminate in its transportation and freight charges in favor of other persons and localities and against Danville and its people, merchants, tradesmen and others. To instance : The said railroad has arranged its freight charges from Charlottesville, Richmond and Lynchburg to Reidsville, Greensboro', Durham, Salisbury, High Point, Asheville and Charlotte, N. C., points south of Danville, that far higher relative rates are charged to the people of Danville and country adjacent than are charged by said road to the people at the points which are referred to or named.

Third. That the defendant discriminates against Danville, its merchants and people adjacent, in its freight charges by applying or attaching to goods or merchandise received from other lines of road for Danville local rates or charges from the point of reception to point of delivery at Danville, notwithstanding it receives from said other lines of road goods of similar character for and carries to such other points at lower and through rates at the same time and by the same haul.

Fourth. That the defendant discriminates against the people of Danville and vicinity by denying to them a lower or approximate "through rate" upon the transportation of their goods which it accords to other persons and points south, say from Richmond to Durham, Salisbury, High Point, Asheville and Charlotte, N. C.

Fifth. That the defendant violates the "long-and-short-

haul " clause of the fourth section of the Act to regulate commerce by charging more for the transportation of meat, grain, etc., from Danville to points south thereof on its line than it charges from Richmond, Lynchburg and Charlottesville for the transportation of the like property.

Sixth. That the defendant discriminates against Danville and its people and the vicinity, in its charges for the transportation of iron and coal, and particularly in favor of Lynchburg.

Eighth. That the defendant charges to the manufacturers and others at Danville and others dealing with them exorbitant and unreasonable charges for the transportation of tobacco. For example, tobacco is shipped from Richmond to San Francisco, Cal., for from \$1.50 to \$1.61 per cwt., but the charge for the same from Danville via Richmond by and under the auspices of said road to San Francisco is \$3 per cwt. Charges for the transportation of tobacco from Danville to points in Florida and other states are similarly high and unreasonable.

Ninth. That defendant exacts from the merchants and traders and people of Danville and vicinity unreasonable rates for transportation of property. For example, the charge on first-class freight from New York to Lynchburg, 425 miles, is 60 cents per cwt., while from Lynchburg to Danville, 66 miles, it is 33 cents per cwt.

These several wrongs were charged to be in violation of the second, third and fourth sections of the Act to Regulate Commerce.

The defendant made answer to this complaint by general denial, but before the case was brought to a hearing the complainants filed an amended petition stating therein that it was "to be heard with said original, setting forth other matters and charges of violation of the Act to Regulate Commerce by the said Richmond and Danville Railroad Company, to the detriment and injury of said city of Danville, its merchants and traders and people generally, as well of said city as of the country adjacent."

The charges in the amended petition were :

First. That the defendant after the passage of the Act to Regulate Commerce discriminated against said city and its people by charging them higher rates for the transportation of property than it charged to other persons and places for like and contemporaneous service under similar circumstances and conditions.

Second. That the defendant in its charges has given undue and unreasonable preference and advantage to citizens, merchants and traders of Richmond, Lynchburg and New York over the citizens, merchants and traders of Danville.

Third. That defendant has given undue and unreasonable preference and advantage to merchants, traders and consignees in Richmond over those in Danville in the transportation of property from Williston and Columbia, S. C., and Charlotte, N. C., by way of Danville to Richmond. Under this charge is specified the exacting of \$80 for a car-load shipment from Williston to Danville, when the rate by the car-load for the transportation of the like property from Williston to Richmond was but \$72.

Fourth. That defendant discriminated in like manner as between Danville and Richmond in shipments from Augusta, Ga., specifying a shipment of cotton batting at \$2.76 per cwt., from Augusta to Danville when very much less was charged from Augusta to Richmond, the greater distance.

Fifth. That since the passage of said act defendant has charged unreasonable rates for the transportation of property between Danville and points north, south and west thereof. Instance is specified of a charge of 97 cents per cwt. upon a shipment from Piedmont, S. C., of the same kind of goods which were transported by defendant between the same points before the passage of said act at 40 cents per cwt.

Sixth. That defendant since the passage of said act has discriminated against Danville and in favor of Richmond, Baltimore and New York, in shipments of property from

Piedmont aforesaid. Specification is given of rates on the same property as follows : To Richmond, 54 cents per cwt.; to Baltimore, 51 cents per cwt.; to New York, 55 cents per cwt.; to Danville, 97 cents per cwt.

Seventh. This also relates to shipments from Piedmont to Danville at the excessive rate of 97 cents per cwt.

Eighth. That defendant has in like manner discriminated in favor of Richmond, Baltimore and New York and against Danville in the shipment of live stock from Newport, Tennessee, Asheville, N. C., and other points to said cities, respectively.

Ninth. That defendant has charged to the citizens, traders and manufacturers of Danville, upon goods shipped to San Francisco, Cal., Muldon, Miss., Trabue City, Fla., and other points north and south, excessive and unreasonable rates, and more than were charged upon like goods shipped from Liberty, Lynchburg and Richmond, Va., under like circumstances and conditions.

Tenth. That defendant has charged unreasonable rates to the merchants and traders of Danville upon meat, lard, grain, flour, dry goods, iron, coal and heavy goods generally from points south, west and north, and more than it has charged to merchants and traders of Lynchburg, Charlottesville and Richmond, Va., Baltimore, New York, Augusta, Ga., Cincinnati and Mansfield, Ohio, Louisville, Chicago and other points for longer hauls under substantially similar circumstances and conditions.

Such were the charges in the petition as finally perfected. The defendant, by its answer, made general denial of their truth, except in certain particulars where specifications of illegal charges had been made, and in regard to these answer was made as follows :

The charge of eighty dollars for a car-load shipment from Williston to Danville was admitted, but Williston is a point not on the line of defendant's road, and the sum named was

for the total transportation and was not illegal. Nevertheless, by a new and revised tariff the charges are so made on all the points on defendant's roads and lines that they are not less to Richmond than to Danville from any point south of Danville.

The charge of \$2.76 from Augusta to Danville is admitted, but it is averred that the charge was not illegal when made, and that the rate has since been reduced and is now from Augusta to either Richmond or Danville but 64 cents per cwt. for the like goods.

The charge at the rate of 97 cents per cwt. on a shipment of baled cotton goods from Piedmont to Danville is admitted, but is claimed to have been an error, the true rate at the time having been not 97 cents per cwt. but 48 cents per cwt., and it is averred that defendant has repaid the overcharge on its attention being called to it.

As to those points not on the line of defendant's road to or from which rates for the transportation of property are supposed to operate to the prejudice of the city of Danville and in favor of any other city or locality, the answer denies that the defendant makes rates, except for the transportation so far as it is upon its own line, and avers that beyond the junction points with other roads they are made by other carriers. The answer, therefore, denies all responsibility on the part of defendant for the rates thus made by others for a transportation which is not upon its own line.

Such were the issues made by the parties by their pleadings, and upon which the Commission is now called to pass. Evidence was taken upon them by deposition and also orally at the public sessions, and the full extent of the grounds of accusation on the part of the city of Danville was brought out and explained by leading citizens and traders. It is undeniable that the subject presented by the issues is one of very great importance to the people of Danville, and that many of them are firm in the belief that the defendant has been and still is guilty of serious violations of law. If they are not mistaken in this, and it is in our power to bring the infraction of law to an end, we ought unquestionably to exert all our authority for the purpose. Danville is one of the lead-

ing towns on the line of defendant's roads, and if the fact is as the complainants aver, that the defendant discriminates to its prejudice in making its tariff sheets, the wrong is not only necessarily damaging, but it must be altogether inexcusable. Indeed, the defendant does not attempt to excuse discrimination, but denies its existence; and in so far as we shall find it to exist, it will stand undefended. If, however, what may seem to be discrimination shall prove to be unfavorable results from general causes, not under defendant's control, the same proof that exonerates the defendant from responsibility will preclude the Commission from any attempt to give relief in this proceeding. This is too obvious to need more than bare mention; any adjudication against the defendant must necessarily be grounded on a finding of issues involving violation of law against it.

From the voluminous evidence taken in the case it appears that previous to the passage of the Act to Regulate Commerce there were several points on the line of defendant's roads which were recognized as points at which the competitive forces operated more strongly and persistently than they did at the intermediate stations, and to which for that reason more favorable rates were given than to such intermediate points, though the doing so resulted in the making of the greater charge on the shorter haul in many cases. One of the favored points was Richmond; others were Lynchburg, Charlottesville, Danville, Va., Columbia, S. C., Augusta and Atlanta, Ga. A diagram of the rates to the several stations on defendant's line, as they were then resembles to the eye the blade of a saw, the rates being higher at intermediate stations and descending sharply at the points named. There were also some points off the line of defendant's roads which were in like manner favored by the combination of rates which other carriers made with the defendant. In this respect the condition of things which existed on defendant's lines was the same which prevailed generally throughout the Southern States. At all points of great concentration of business the rates were very much lower than were given to intermediate and less important stations. They were given better rates because they were recognized as competitive.

points ; and to speak of a town as a competitive point was to the common understanding equivalent to saying that it was a point to which exceptionally low rates of transportation were given by the railroad managers.

This condition of things as regards rates was of great importance to the towns favored, and tended to emphasize the advantages each of them might otherwise have had over all the towns between it and the next competitive point to the north or south of it. It was, therefore, favorable to Danville, and resulted in its people paying lesser rates on longer hauls than were paid by people at non-competitive points for shorter hauls of the like property over the same line and in the same direction. A strict enforcement of the fourth section of the Act to Regulate Commerce would have taken away, or at least have greatly modified these advantages ; and when defendant and other carriers applied for relief from its strict application many of the favored towns came forward with petitions that its request be granted. The complainants in this case, however, were not among the petitioners. On the contrary, they appeared with a protest, and in a printed argument filed with the Commission contended "that the operation of the fourth section of the Act for the regulation of commerce should not be suspended or practically nullified, but that the same should be executed with that force and vigor intended by the Congress which passed it. The clamor for its suspension comes mainly from railroad corporations whose grasping propensities and inexorable demands it was the intention of Congress to curb in the interest of the people, or from competitive points long separated from each other, which prosper upon the hardships inflicted by their allies, the railroads, upon intermediate points not favored by a competitive system." This was a very frank expression of opinion, and no doubt represented the honest and matured convictions of those who signed it.

After the orders which were made for relief under the fourth section of the act had expired, the defendant entered upon an extensive revision of its tariff sheets in the direction of bringing them more nearly into conformity with the gen-

eral rule prescribed by that section, and with the result that there is not now any point on the line of defendant's roads north of Columbia, S. C., to which a consignment at the established rates would result in a greater charge being made for the shorter haul of the like kinds of property on the same line and in the same direction. This result has been brought about principally by a gradual reduction of the rates at non-competitive points; and, though some increase in rates has been made at some of the competitive points, the increase has not been general, nor in any case which has been brought to our attention has it been very great. The charges, however, being in the direction of equalizing railroad advantages as between competitive and non-competitive points, must necessarily to some extent prejudice the jobbing interests of towns situated as Danville has been, not only because they render it possible for rival establishments to spring up and maintain themselves in the smaller towns, but because the retailers in the smaller towns, under the favorable rates which are now given them, are enabled to deal directly in larger and more distant markets. Nobody can justly complain of a railroad company for so equalizing its rates as to render this possible, for the law had such an equalization of rates as one of its leading purposes, and provided for it because justice as between the competitive and non-competitive points seemed, in the opinion of the Legislature, to require it.

It is evident from the testimony given by some of the witnesses that the equalization of rates by the defendant as between Danville and the smaller towns on each side of it has, in the minds of some parties, been regarded as a grievance. Thus the witness, John W. Caton, in answer to the question, "Is Danville regarded and held by the Richmond and Danville Railroad Company as a competitive point for traffic?" said, "It is not. I was informed by the general freight agent, in the presence of another high official of the road, that Danville was not a competitive point, and could not be so held by the road, and that they could not change their local freight rate as applied to Danville, for if the change was made in regard to Danville, Reidsville and Greensboro',

although non-competitive points, would be demanding the same thing; that Danville could not have through rates. These things were told me by the officials of the road when I was demanding better rates for myself and my town."

Now, to any one who has given the Act to Regulate Commerce much attention, it must be obvious that a complaint against a carrier that it gives to non-competitive points the same rates which it gives to competitive is not a complaint that the act is violated. On the contrary, the spirit and purpose of the act require that when the circumstances and conditions will fairly admit of it the charges to all points for a like service should be made relatively equal. If, therefore, this defendant were to so arrange its tariffs as to give the least important station on its line rates as favorable as it allowed to the most important there would in its doing so be nothing out of harmony with the law. The result might for a time be prejudicial to competitive points, but the carrier cannot be blamed for a consequence which the law favors; and there can be no doubt that the law favors Reidsville and Goldsboro' having rates as low as are given to Danville or to Richmond when the circumstances and conditions are such as to render it practicable. There is nothing, therefore, in the giving of such rates which the law will discountenance, much less punish.

But, passing from this general charge to some specific case in which the rates which were exacted by defendant are named, we find it to be an undoubted fact that charges have been made which cannot be justified.

First. There is evidence that defendant in two instances at least charged 97 cents per cwt. for the transportation of cotton baled goods from Piedmont, S. C., to Danville, when the established rate from Piedmont to Richmond, 141 miles further, was but 54 cents. Investigation shows that these charges were not warranted by the tariff then in force, which was 48 cents per cwt. to Danville instead of 97 cents. This is admitted by defendant, and the overcharge is claimed to have been the error of an agent. Whether the error was intentional or unintentional, the parties who paid the charge are entitled to have the overcharge refunded. It is stated

on behalf of defendant that this refunding has already taken place, but the evidence has not been placed on file, and we cannot find that to be the fact. On the other hand, it is to be said that the parties entitled to be reimbursed have not applied to the Commission for the purpose, and we are not informed that any order on their behalf would be acceptable. The proof of the overcharge comes into the case as evidence of a general course of dealing, and not as a basis for a specific money claim, and there is consequently no occasion to speak of it further.

There is also evidence that in July, 1887, the defendant on a number of consignments of melons by the car-load from Columbia, S. C., and other points to Danville, charged and received from consignees a sum in excess of what were then the current rates for the transportation of like freight from Columbia and such other points to Richmond, the greater distance. In respect to these consignments, which were made after this proceeding was begun, it appears that the defendant's revised rates, which were in force when the hearing was had, do not admit of any higher charge being made on a consignment of any species of property to Danville from any point on defendant's road south thereof than is made on a consignment of like property to Richmond. The wrong, therefore, in so far as it consisted in making the greater charge for the shorter transportation, has been remedied for the future; and of this case, as of the last, it may be said that as the parties by whom such greater charges were paid are not now here asking for the refunding of moneys wrongfully exacted, this notice of the evidence is all that the case as it stands seems to call for.

Similar remarks may be made regarding a consignment of cattle from Newport, Tenn., to a purchaser at Danville, upon which a rate of \$14 per car is shown to have been charged in excess of what was then the current rate from Newport, through Danville, to Richmond; also regarding a charge on a consignment of cotton batting from Atlanta to Danville, on which 58 cents per hundred pounds was charged in excess of the rate for the greater distance to Richmond. Neither of these transactions is explained by the defense, and whether

they could be justified if the parties making payment of the sums exacted were here demanding a refunding, we cannot undertake now to say. The transactions were proved in support of allegations that defendant violated the long-and-short-haul clause of the act, and they prove that fact unquestionably. The proof shows, however, that since that time defendant's tariffs have been changed, and at this time they will warrant no charge between the points named and Danville which is higher than the regular rate upon the like property to Richmond. The wrong done, therefore, in so far, as it was continuous, has thus been brought to an end.

These, however, and one or two other transactions of a like character are minor matters as compared to the charge of discrimination against Danville, supposed to be shown in the rates charged on shipments of heavy freights, particularly grain, flour, meat, provisions, &c., made to Danville from western and northwestern points, and of tobacco in the other direction. The discrimination is supposed to favor, particularly, Richmond and Lynchburg, which places are said to receive such advantages under defendant's established rates that competition with their merchants and traders on the part of the dealers in like goods at Danville is no longer possible on equal terms at any points on defendant's road in the vicinity of Danville or south of it.

The evidence which was given on this branch of the case comes from reputable business men of Danville, who show very clearly that in respect to the western and northwestern trade Danville is at a great disadvantage in the competition. The reason is obvious. Richmond and Lynchburg receive consignments of grain, flour, provisions, &c., from Chicago, St. Louis, Louisville, Grand Rapids, and other western and northwestern towns on through bills of lading and over long through lines which accept for the transportation rates very much below the local rates on connecting roads. Consignments of like property for Danville will be delivered to defendant's road at Richmond, Lynchburg, or some other junction point to which the charge will be the same as to Richmond, and from the junction point to Danville will be charged local rates, which, in proportion to distance, are very much

greater than those charged on the through line. The Richmond and Lynchburg dealer therefore acquires his stock at a less cost than does the dealer at Danville, and is able to undersell the latter almost at his own doors. How great is the difference will appear when it is stated that the former pays 22 cents per cwt. on grain from Chicago, while the latter pays 34 cents, and the difference in the charges on flour, meats, and other provisions are in like proportion. This is unquestionably a great hardship to the Danville dealer, who must not only pay more freight moneys than his competitor would pay on a like consignment, but more in proportion to the distance the property is transported.

What is true as to consignments from the west and northwest is equally true of those which are made for transportation in the other direction. The defendant exacts local rates from the local dealer to or from the points of junction with the through lines, and these are proportionately so much greater than the rates charged on the through lines that it is not surprising that one who compares them without making inquiry into the circumstances under which the charges respectively are made, is inclined to pronounce the charges of defendant unfair and excessive, as some of the witnesses did in the evidence taken by deposition. Thus, Samuel P. Wimbish, in answer to an inquiry whether the defendant charged to the people of Danville more than was reasonable and just for the transportation of property, said: "Yes; I should say so. If the charges made by said road to the people at other points for the transportation of their goods is any criterion to go by I should say that the charges were unreasonable and unjust. The said road charges far more relatively for the transportation of goods from Danville to Lynchburg, only 65 miles, than other roads and the said Richmond and Danville together charge for transporting goods of the same kind four or five times the distance to Richmond and Lynchburg under similar circumstances and frequently by the same haul."

Like evidence was given by other witnesses. Thus, Geo. W. Yarbrough, answering a similar inquiry, said: "I think it has. If the said road and its connections can bring grain from Chicago to Lynchburg, a distance of 800 or 900 miles,

for 22 cents per hundred pounds it is certainly unreasonable and unjust to charge Danville, only 65 miles further, 34 cents per hundred pounds for the same service." And John W. Carter said: "I do not think the charges have been reasonable and just. By the rates shown it appears that the charges made by the Richmond and Danville road are much higher for the same service than are made by other roads. For example, the charges made on meat, lard, grain, flour, &c., are very much higher relatively from Lynchburg and Richmond to Danville than from Chicago, St. Louis and other places to Lynchburg and Richmond. In fact, the rate of charges is from four to ten times greater, considering distances and other circumstances." Much other testimony was given to the same effect.

In all this testimony two assumptions appear to be made which would be of great importance in this case if they should be found warranted by the facts. The first is that defendant may be held responsible for the rates made on connecting lines when through rates are named to consignors over such lines in connection with its own; and the second is that rates made on long through lines may form a just basis of comparison with defendant's rates when the reasonableness of the latter is in question. Both these propositions are denied by the defendant. It is very evident from the testimony that the hardships of which the witnesses complain arise chiefly from the very great disparity between the through and local rates; and, if defendant is responsible in whole or in part for both, there may be just ground of complaint against it. That it is responsible for the local rates is unquestionable, for it makes those without the concurrence or interference of any other carrier—at least so far as any evidence before us shows. Perhaps it is not unnatural that a customer of the road, who did not inquire into the facts, should suppose the defendant to be in some measure responsible for the through rates also, especially if he found that defendant issued through bills over its own and other lines, named the through rates to those who asked for them, and received payment of freight moneys for the whole distance exactly as it would if the whole amount were its own.

All these things may happen and still the defendant not be responsible for the making of any rate off its own line. In most respects carriers by railroad may act independently, provided they afford to each other all reasonable facilities for the interchange of traffic. It is for this reason that railroad controversies and questions of rates are attended by so many special embarrassments; they cannot be adjusted as they might be if all roads belonged to one system and were under a single control. If that were the case the rates might be so arranged and controlled as to prevent many of the inequalities that are now liable to operate oppressively to particular localities. When intersecting roads are separately controlled and owned it may well happen that one which is of the very highest importance to the community it serves and which deals with them fairly, shall nevertheless be powerless to prevent the rates of other roads giving to some of its towns great advantage over others, unless it consents to sacrifice its own revenue in so doing. Possibly such may be the case here.

The defendant insists and produces evidence to show that it has no voice in making rates except on its own roads; that it is enabled to name through rates only, first ascertaining what the rates charged by connecting roads are, and then adding to them its own rates; that it issues through bills over other roads and honors the through bills issued by other carriers under mutual arrangements made to facilitate business and accommodate the public, and that when it receives freight moneys for a transportation of property over the lines of other carriers it does so as the agent merely of such other carriers and because doing so is a general convenience to the patrons of the road and not because it is in any way responsible for the making of the rates upon which the moneys are paid. This testimony stands uncontradicted in this case, and if we accept it as presenting the actual facts, as under circumstances we must, it relieves the defendant from all responsibility for injurious results to the business of Danville consequent upon unfair or unequal through rates and leaves it to defend only the rates which are made for transportation on its own lines.

The difference between the local and the through rates is certainly very marked and striking, and it results unfavorably to Danville because Richmond and Lynchburg, which are competing towns for the trade along the line of defendant's road, are directly upon the long through lines, while Danville is not. The latter must therefore pay local rates from or to the points of junction of defendant's road with the through lines upon all the freight sent or received over such lines, but this is an advantage which the towns first named have in their situation; they are specially fortunate because the long through lines reach them and do not reach Danville. For this good fortune the defendant is not to be thanked by the favored town or blamed by the other, for the through lines have become established where they are without its aid or intervention. The obligation of defendant is to make rates on its own line which are fair, reasonable, and undiscriminating; and if it does this the responsibility, if there is any, for inequalities as between towns on its line which result from the rates made by other carriers must rest upon those who make them.

The assumption that defendant is in some way responsible for rates made over other roads is very prominent in the complaints made in the testimony of the witnesses Wimbish and Yarbrough. Mr. R. Louis Dibrell also, after testifying what were the rates of the defendant to Toronto, St. Louis, Mo., and Quincy, Ills., on tobacco, complained of them as excessive and also as being unstable and frequently changed. The instability may or may not be chargeable to defendant; the witness does not state the facts sufficiently to enable us to judge, and it is possible that defendant's rates may have remained unchanged while those of some other carrier in the line were unstable. In respect to the aggregate of the rates, however, the witness presents the facts sufficiently so that, if he labors under no mistake, the responsibility for any wrong that was committed can be definitely fixed. He desired to make a consignment of tobacco from Danville to St. Louis, and on applying to the agent of defendant's road at Danville he was told the charge would be 65 cents per cwt. This he thought excessive, and he says, "By paying a forwarding

agent in Lynchburg and other points we can and did obtain rates through him much lower than those quoted and charged to me by the Richmond and Danville road." And he goes into explanations which show that the lower rates he obtained were in reduction of the rates from Lynchburg to St. Louis, no part of them being rates made by the defendant.

The most obvious comment upon this evidence is that while it fixes no responsibility upon the defendant it tends to prove a violation of law on the part of the carrier connecting with defendant at Lynchburg. It need hardly be remarked that if the law is obeyed by carriers the intervention of a broker can be of no service in obtaining better rates because they cannot be given rates which are lower than those open to the public in general. If the law is complied with all rates will be open and public, and no carrier will be at liberty to depart from them at the solicitation of a broker or of any other person. If, as this evidence tends to show, a special rate was obtained in this case through the influence or persuasions of a broker a penal offense was committed, and the transaction was one of a kind that the Act to Regulate Commerce was specially designed to put an end to. The Commission has therefore felt impelled to institute an inquiry on its own behalf in order to ascertain whether either of the roads connecting with defendant at Lynchburg was guilty of a violation of law as the proofs tended to show. This investigation has been pursued so far as to show that, though the transaction testified to by the witness took place as stated, there is reason to believe that the intervention of the broker had nothing to do with the obtaining of low rates. It is claimed by the road over which the shipment westward from Lynchburg took place that the low rate was given by its agent inadvertently, through the use of an old special tariff which had escaped the attention of the general freight agent. Whether the giving of the rate to the broker in this case was an excusable error or an intentional violation of the law it is plain that no wrong in respect to it is brought home to the defendant. It, however, appears that the 65-cent rate named to the witness as the charge from Danville to St. Louis

was higher than it should have been. Errors of such a kind will sometimes occur when the rate is made up by adding together those made by several carriers, especially when the point of destination is one to which a shipment from the initial point is seldom made. Whether the overcharge in quotation of rates in this instance occurred from ignorance or from carelessness, or was an attempt at extortion, is not now material; no shipment was shown to have been made under it, and it is not probable the error will occur again.

We have still to consider whether the rates charged on defendant's road are shown, by comparison made with rates on other lines, to be excessive and unreasonable. In the main the comparison has been made by the witnesses with rates on through lines over which the great bulk of the traffic in grain, flour, dressed and canned meats, and provisions passes from interior points to the seaboard. The difference between the rates charged for transportation over those lines and the rates made by the defendant is so very great that some of the witnesses in testifying have not hesitated to declare that defendant's charges were thereby proved to be excessive. The logic which brings the mind to this conclusion is that other roads would not accept the low rates unless they were justifiable, and, if profitable to them, rates made by defendant which are several times as high must necessarily be exorbitant. This logic, unfortunately, though at first blush it seems reasonable, does not always stand the test of examination.

It is a well-known fact in transportation that the cost of carriage depends very largely upon the volume of business, the cost of carrying five tons being very much greater in proportion than the cost of carrying a thousand tons over the same line. That carrier, therefore, can give the best rates whose business is largest and most steady, and as the through lines between the Mississippi and the seaboard are best situated for a large and steady business they can undoubtedly, as a general fact, give much better rates than the roads which intersect them; but it is equally well known that the proportionate cost is diminished with the increase of distance, and as the through lines carry the traffic mentioned a very long

distance before delivering to defendant the portion which is to go over its road, they are, for this additional reason, enabled to make exceptionally low rates. These two facts are quite sufficient to render any comparison between the rates charged by the leading through lines and those made by the defendant of little or no value. The circumstances and conditions under which the traffic is carried by the through and the intersecting roads, respectively, are too great and too diverse to admit of useful comparison.

But another fact of importance is also to be borne in mind in the same connection. However reasonable may be the inference that long through lines will not accept rates that leave no margin for profit on the business, it is a matter of public history that some of the through lines whose business has been very large have not been profitable to stockholders. Some of them have been quite the reverse of profitable, and after having been for some time in the hands of receivers have been sold under mortgage or reorganized on such terms that the original stock was either entirely or partially sacrificed. It cannot be safely affirmed that this has been altogether due to the low rates; but excessive competition and the acceptance of traffic for transportation at rates which were not fairly remunerative have been sufficiently common to rebut any presumption that carriers invariably refuse to accept business when there would be no profit in it. It has, moreover, been several times proved before the Commission without contradiction, that much of the long-haul traffic of the country is carried at rates which are little above the actual cost of movement; so that repairs, interest, rents, and all fixed charges of the same road are necessarily borne by their short-haul traffic. No case under investigation, when such proof was given, concerned the roads whose low rates are in question here, and whether the like proof could be made in respect to them is not very important now. The fact is notorious, and is abundantly proved by the rate sheets now on file with the Commission, that the disparity between local and through rates is commonly very great, and when such is the case it is obvious that the local rates of one road are not proved to be excessive by testimony which shows

only that they are very much above the rates which are charged upon long-haul traffic by other roads. The comparison, if made at all, should be with local rates. Even then it would not be very conclusive without an inquiry into the conditions and circumstances of the traffic on the roads whose rates were compared, for freights on some roads, for a diversity of reasons which it is needless to undertake to specify here, can be carried much more cheaply than on others.

We are constrained to say, therefore, that the rates charged by the defendant, and which the petitioners complain of as excessive, are not shown by the proofs to be so. The comparison made with through rates on lines differently circumstanced is likely to be misleading, and is certainly altogether inconclusive. For the reasons given we could not base a judicial conclusion upon it. This leaves the allegation unsupported, for the other evidence on this branch of the case is slight and does not bear directly upon the point in controversy.

The complaint which in the minds of the petitioners and their witnesses seems to be the most serious, is stated by them as a complaint of discrimination against Danville in denying to it through rates while according them to others. To understand what this discrimination consists in it is necessary to give some of the testimony. The witness Yarbrough, in answer to the question whether the defendant had denied to Danville the benefits of the through-rate system which had been accorded by it to other points, replied that it had. "I have asked for through rates frequently, and others have done the same in Chicago and elsewhere. I cannot state the time or times when I made such applications. The applications have always been refused."

It is to be observed that the only application here specified was one made at a great distance from defendant's line, and not stated to have been made to any agent of defendant. It is also to be observed that no points are named which are given rates in any way different from that in which they are given to Danville. The witness, however, on being asked to state in what the discrimination against Danville consisted, went on to say: "It consists in according to other points,

notably Richmond and Lynchburg, in the re-handling of provisions spoken of, a better rate and facilities than it accords to Danville for the same services." And he proceeds with specification as follows: "Provisions shipped from points north of the Ohio river and re-shipped at Lynchburg and Richmond are carried through to points in North and South Carolina at rates considerably lower than if the same goods were shipped to Danville and re-shipped from Danville to the same points South."

The witness, Samuel P. Wimbish, in answer to the question whether defendant, since the fifth of April last, had discriminated in matter of freight rates to Danville and other points and against Danville and its people, said: "To the best of my knowledge and belief it has. For example, defendant, before the fifth of April and since, had its freight charges so arranged as that said charges from Richmond and Lynchburg to Greensboro', Charlotte, and other points were and are now far lower, relatively speaking, than between any of said towns and Danville."

Witnesses John W. Caton and B. S. Crews gave similar evidence, and it seems to stand in contradistinction to that of the officers of the road, who testify positively that no advantage in rates is accorded to either Richmond or Lynchburg and that the same charges in proportion to distance are made from them as from Danville to other towns on defendant's line. The supposed discrimination is, however, explained by tabulated statements which the witness, in support of the petition, files, and from which we may see exactly what the discrimination consists in.

These tabulated statements show what the charges are which are made by defendant upon consignments of grain and of meats from Richmond and Danville respectively to other towns on defendant's line, and also the charges made from Richmond to Danville, the purpose being to show that, in competing for the trade of local points on defendant's road, Danville is placed at a disadvantage. The statement, so far as it relates to charges for the transportation of grain, is here given:

From Richmond to Reidsville, N. C., 164 miles, charge 18

cents per cwt.; from Richmond to Danville, 140 miles, 15 cents; thence to Reidsville, 24 miles, 8 cents; total, 23 cents.

From Richmond to Greensboro', 213 miles, 20 cents; from Danville to Greensboro', 49 miles, 10 cents; added to rate to Danville, 25 cents.

From Richmond to Durham, 230 miles, 21 cents; from Danville to Durham, 80 miles, 15 cents; added to rate to Danville, 30 cents.

From Richmond to Charlotte, 281 miles, 21 cents; from Danville to Charlotte, 141 miles, 15 cents; added to rate to Danville, 30 cents.

From Richmond to Asheville, 360 miles, 28 cents; from Danville to Asheville, 220 miles, 27 cents; added to rate to Danville, 42 cents.

From Richmond to Salisbury, 230 miles, 21 cents; from Danville to Salisbury, 90 miles, 15 cents; added to rate to Danville, 30 cents.

From Richmond to High Point, 218 miles, 21 cents; from Danville to High Point, 78 miles, 19 cents; added to rate to Danville, 36 cents.

The showing in respect to meats is similar to this, and another statement of shipments from Chicago or other western points to Richmond and to Danville, respectively, would, when re-shipments were made to the other points named, result in like discrepancies. The discrimination the petitioners complain of is that defendant's rates are so made that the Danville merchant cannot deliver his goods at Reidsville, Greensboro', and other towns named at which he may sell them at rates for transportation as low as are accorded to Richmond on shipments to the same point.

The most casual inspection of this statement, however, will make plain to the mind that the difference in rates which it shows in favor of Richmond results from the fact that from Richmond the property is supposed to be taken directly to the several points named, while the Danville shipments are

made first from Richmond to Danville and then from Danville to the ultimate destination. The difference is, therefore, a difference between the charge for one transportation covering a definite distance and that for two transportations which aggregate the same distance. The petitioners think that upon such goods bought in Richmond, as they sell at Reidsville or other points named, they should be charged in the aggregate only the rates which are charged when the consignment is directly from Richmond through to the same point. Defendant assents to this when the Danville merchant ships directly from Richmond to the place of sale, but declines to allow it when the shipment is first to Danville and then to the ultimate destination. It is the denial of this privilege of having the two shipments count as one which constitutes the discrimination complained of.

The concession here claimed bears resemblance to an attempt to compel the railroad company to establish the system which in some parts of the country is known as "milling in transit"—a favor in transportation most often, perhaps, allowed to manufacturers of flour, but which is known in other industries also. In proceedings before the Commission where this system has incidentally been spoken of it has been said to have had its origin in the desire of carriers which received wheat for delivery to millers on their line to control the transportation of the manufactured article and keep it from passing to the hands of competitors. It is not likely that this is the sole reason for the practice, and we mention it only as one that has been named. The control of the carriage would be assured by giving to the consignor of wheat a through rate from the point of reception to the point at which he expected to market his flour, but with the privilege of converting the wheat into flour at an intermediate point. The advantage of such a privilege to the consignor may be shown by a supposed case. Let it be assumed that the rate on wheat from Chicago to New York is 25 cents per hundred pounds, and from Chicago to Rochester 18 cents, while from Rochester to New York on flour it is 15 cents. If, now, the Rochester miller purchases his wheat and sends it forward on the through rate with the privilege of milling it,

in transit it is evident he will have saved when it has reached New York as flour 8 cents per hundred pounds, and this very large saving would give him a great advantage over millers not having a like privilege.

It is obvious, however, that the giving of this privilege under the circumstances suggested would be equivalent to a concession in rates on the part of the railroad company, since the cost of the carrier of the two shipments, first of the wheat to Rochester and then of the flour to New York, would necessarily be somewhat greater than the cost of a single shipment of a like quantity from Chicago to New York direct without unloading on the way. It is hardly to be supposed, therefore, that a railroad company will voluntarily grant such a privilege unless some compensating advantage to itself will flow from it or unless the law compels it.

When the question of granting such a privilege is under consideration a railroad company will naturally consider, not the advantages merely, but what the disadvantages to itself are or may be, and some of these have also been suggested when the subject has been referred to on our hearings. The third section of the Act to Regulate Commerce makes it unlawful for any carrier subject to its provisions to give any undue or unreasonable preference or advantage to any particular locality. The question may be raised under this section whether it would not be unlawful for a carrier to give the privilege of milling in transit to one town on its line and deny it to others; but a railroad company might have an interest in granting the privilege to a town which was a common point for other roads, and no such interest in granting it elsewhere; and the mere fact that a plausible question might be raised as to the right to grant it to one point only might be thought a sufficient reason for denying it altogether.

A question may also be raised—and, indeed, we are informed has been raised, in another part of the country—under the second section, which prohibits and renders unlawful any discrimination in rates as between persons. In the supposed case the miller, under the fiction of a continuous shipment of wheat from Chicago to New York, would in reality pay a proportion of the through rate as for a shipment

to New York of flour from Rochester; but unless this proportion was less than the current rate on flour from Rochester to New York the privilege would be of doubtful value, and the fact that it is less constitutes the inducement to the miller for seeking the privilege. If, therefore, while one miller procures his stock in Chicago, his neighbor in the same business, and who expects to sell it in the same market, purchases his wheat in the local market, the latter finds himself, when he sends forward his flour, placed at a disadvantage in rates; and he is not unlikely to raise the question whether it is lawful to make a charge for the transportation of his flour which is greater than what would be the just proportion from Rochester to New York of the shipment made by the other from Chicago. The shipments of flour in the two cases would begin at the same place, the service as to each would be the same, and so also would be the cost of carriage.

We mention these as being questions which are frequently suggested, and which, therefore, a carrier is apprised, may possibly be raised in case such a privilege is conceded. We do not say they are serious or difficult questions; they have not been discussed before the Commission; they have never in any form been presented for decision, and we shall, of course, refrain entirely from expressing any opinion upon them; but the fact that such questions may be raised must naturally have its influence with the carrier when the question of granting the privilege is under consideration. He will be apprised that the concession may not unlikely be followed by controversies; possibly by litigation.

It is evident that the privilege desired by complainants might raise like questions to those above indicated. Complainants wish to be at liberty to purchase goods at the points of supply, and instead of paying the regular rate for the transportation thence to Danville and the local rates from Danville to the place at which they make sale, they ask that the whole shall be treated as one continuous shipment and paid for accordingly. Probably if the privilege were granted the re-shipment would sometimes be made without breaking bulk, but it could hardly be expected that this would occur

very generally. The privilege would be in the nature of a concession in rates made to Danville. The officers of defendant decline to grant it, and the question is whether they are violating a legal right in so doing. One reason which they assign for their action is that if they make the concession to Danville they must do the same for Reidsville, Goldsboro', Durham, and all other places on their line that may ask it, or they will be guilty of a violation of the Act to Regulate Commerce; but the concession, if thus made general, would be of little or no advantage to any one.

It does not become necessary in this case to decide whether if the concession were thus made to one town it must be made to all others, for that question is not before us. The defendant has declined to make the concession to any town, for reasons some of which are above indicated, and the charge is that this amounts to unjust discrimination, because the effect is prejudicial to Danville and favorable to some other localities; but this effect cannot determine the question at issue. There can certainly be no discrimination as against any particular town in action which is general and applies alike to all towns. Discrimination must consist in the doing for or allowing to one party or place what is denied to another; it cannot be predicated of action which in itself is impartial. This requires no argument; the statement itself is conclusive. A regulation that is general and uniform is the opposite of discrimination. If the result is favorable to some localities and unfavorable to others we may regret the fact, but we cannot under any authority the law has conferred upon us interpose to change it.

The conclusion is that the Commission cannot adjudge the defendant guilty of unjust discrimination in the particular mentioned. Neither can it find upon the evidence that any advantage which is obtained by Richmond or any other locality by means of low rates given by connecting roads is chargeable as a wrong done by defendant. The naming of a through rate by the defendant to or from any distant point and the receiving of the freight moneys on a consignment do not of themselves charge the defendant with any responsibility in respect to the rates beyond its own line. There is

no wrong on its part in giving to its customers information respecting such rates nor in receiving payment for both itself and its connections. On the contrary, it is a great business convenience, and any carrier which should refuse to give through bills when it could do so or to name through rates which are made up by adding its own to the rates made by its connections would be justly liable to very severe censure. Through bills are among the most important and valuable of transportation facilities, and it is not only important that the consignor should know before he forwards the goods what the charges upon them for the whole distance are to be, but it commonly saves him much trouble and avoids mistakes if he can procure the information from the local agent of the receiving company instead of being compelled to apply to two or more agents at a distance. The receiving carrier ought, therefore, to keep informed respecting rates over connecting lines, whether it joins in making them or not, and it ought also to give through bills when they are desired if it can arrange with its connections to do so. It will not perform its full duty to the public unless it does so.

The result of our investigation of this case may be summarized very briefly. The defendant has been guilty of some overcharges which the parties paying them are entitled to have refunded if the refunding has not already taken place. The proofs show also that in the spring and summer of 1887 the defendant made rates which were greater on its road to Danville than to Richmond through Danville, but its tariffs have since been so changed that such greater rates are no longer charged. No application is made for the refunding of moneys paid on such rates, and the question whether there should be any is not before us. The Commission has no authority to require the defendant to concede the privilege sought for, corresponding to that of "milling in transit," and the evidence offered to show that the rates of the defendant are excessive and unjust is too inconclusive to justify any finding to that effect.

WILLIAM H. HEARD *v.* THE GEORGIA RAILROAD COMPANY.

Heard December 15, 1887.—Decided February 15, 1888.

Passengers paying the same fare upon the same railroad train, whether white or colored, are entitled to equality of transportation, in respect to the character of the cars in which they travel, and the comforts and conveniences supplied.

Separation of white and colored passengers paying the same fare is not unlawful, if cars and accommodations equal in all respects are furnished to both, and the same care and protection of passengers observed.

By requiring the petitioner, who had paid a first-class fare, to ride in a half car set apart for colored passengers, with accommodations and comforts inferior to the car for white passengers in the same train, who paid the same fare, and without the protection against annoyances furnished to white passengers, the Georgia Railroad Company subjected him to undue and unreasonable prejudice and disadvantage, in violation of the third section of the Act to Regulate Commerce.

J. W. Cromwell and *W. C. Martin*, for petitioner.

Joseph B. Cumming, for defendant.

REPORT AND OPINION OF THE COMMISSION.

SCHOONMAKER, *Commissioner*:

The issue presented by the pleadings in this proceeding is whether the petitioner was subjected to undue or unreasonable prejudice or disadvantage upon the defendant's road in being required, while holding a first-class ticket, to travel in a compartment of a car allotted to colored persons and inferior in its accommodations and comforts to the car for white persons in the same train.

The undisputed facts are in substance that the petitioner, a colored person who resides at Charleston, S. C., and is a minister of the African Methodist Episcopal Church, was in Cincinnati on business, and wishing to return home, purchased at Cincinnati, on June 16, 1887, a first-class through ticket from Cincinnati, Ohio, to Charleston, S. C., for \$19.55, the regular price of such tickets upon the Cincinnati Southern, the East Tennessee, Virginia and Georgia and the Georgia railroads, which ticket was honored by all of those roads. The petitioner, with other colored persons, left Cincinnati on that

day and reached Atlanta, Ga., on the evening of the 17th of June and remained there until the next morning. In the journey to Atlanta over the Cincinnati Southern and the East Tennessee, Virginia and Georgia railroads no distinction was made in respect to white and colored passengers, but both were allowed seats in the same cars. From Atlanta to Charleston the journey was over the defendant's road. On the morning of June 18 the petitioner took the first train out from Atlanta to Charleston, which consisted of two passenger cars besides the locomotive and baggage car. By the regulations of the company the rear car was allotted exclusively to white passengers. The other car was divided by a partition at or near the center into two compartments, with an open space of about a foot in width between the top of the partition and the ceiling of the car, and there was a door in the center. The rear compartment was used as a smoker for passengers of both colors. The forward compartment was used for colored passengers of both sexes, having only one closet, and the compartment being often full of smoke. Train hands and laborers with their tools sat in this compartment, and it was not provided with iced water, the seats were not upholstered, and there was no carpet on the floor. In the white passengers' car the seats were upholstered, the floor carpeted, and there was iced water. The car in which the colored compartment is located is popularly termed a "Jim Crow car."

When the petitioner took the train at Atlanta he attempted to enter the rear car, but was prevented by the conductor and directed to go in the colored car, which he did. The compartment for colored passengers was dusty and dirty and at times as full of smoke as the adjoining compartment, in which men were smoking. There were many colored passengers in the compartment, including about a dozen females. The petitioner remonstrated with the conductor against the condition of the car and requested permission to ride in the other car. This the conductor refused, and told him that that was the colored car and he must ride in it or walk; that he (the conductor) had to obey orders or lose his place. On the journey white men came in the compartment with whis-

key and drank it from the glass used by passengers for water, and indulged in rude and profane language. On the request of the petitioner the conductor caused these men to leave the compartment.

It appears by the testimony of the general manager of the defendant that the Georgia Railroad Company has established rules and regulations in regard to the classes of passengers and cars in which they shall travel; that white passengers must be excluded from the compartment reserved for colored passengers unless the train is so crowded that seats cannot be provided for them elsewhere, and that smoking is not allowed in the compartment provided for colored passengers. He further states that the accommodations are substantially the same for colored as for first-class white passengers; that the interests of the colored as well as white passengers in Georgia are better observed by separating them, and that the colored travel on the defendant's road is limited, not sufficient to justify separate cars, and hence the plan of compartment cars; that on special occasions, when large numbers of colored persons travel, one or two cars are furnished from which white persons are excluded. These rules are made by the general manager and are only oral.

It appeared in the case that in South Carolina and some other States, where a large colored population resides, no separation of white and colored passengers is required on railroad trains, but first and second class cars are provided with lower rates of fare for the second class, and that both colors may travel in cars of either class, as they prefer.

Upon the testimony in the case there is no room for doubt that the petitioner and those of his color who traveled with him on the train in question were subjected to undue and unjust prejudice and disadvantage, and that the discrimination was made solely on account of color.

The petitioner's conduct and bearing, so far as the testimony shows, were unexceptionable. He is a minister of the Gospel, in apparently good standing in a respectable religious organization, and is evidently a man of education and decorous behavior. His subjection, therefore, to the inferior accommodations and discomforts of the colored compartment

amid fumes of tobacco smoke and whiskey, while the railroad company had his money for a first-class passage, enjoyed by white passengers but denied to him, was a palpable violation of the third section of the Act to Regulate Commerce, a clear breach of duty under the contract of carriage, and an indignity to the petitioner for which no extenuation was shown.

The question of discrimination on the ground of color has been before the Commission upon a different state of facts in the case of *Councill vs. Western and Atlantic R. R. Co.* (1 *Interstate Com. Rep.*, 339), and the ruling in that case that the forcible ejection of a colored passenger who had paid a first-class fare from the car in which he was seated, which in that case was designated a ladies' car, and compelling him to ride in a compartment car similar to the one in this case, where the colored passengers were congregated in half a car adjoining a smoking apartment, annoyed by tobacco smoke and other improprieties, subjected him to undue and unreasonable prejudice and disadvantage under the third section of the Act to Regulate Commerce, is entirely decisive of the question here presented, and must be followed in this case.

That decision was based upon the principles of justice and equality in the transportation of persons and property embodied in the act, and resting upon no less a foundation than the Constitution of the United States.

Equality of civil and political rights, and the equal protection of the laws, with no discrimination except for misconduct or crime, are subjects not open for discussion. They are fundamental principles of government and jurisprudence. Whoever attempts to deny these principles in their just application puts himself in antagonism to the established law of the land. Questions may arise with regard to the extent of the application of these principles and the manner in which effect shall be given to them when considerations are involved arising out of facts that laws cannot change.

The undeniable fact of a difference in color is one for which government and law are not responsible. It exists by a fiat transcending human knowledge, and has existed through the epochs of history. It should be recognized and dealt with

like other unchangeable facts, justly always, but with discretion and reason. When it becomes an element in a judicial controversy, one color or race has no exclusive right to recognition nor ground for special favor over the other, but white and black alike are entitled to fair and impartial consideration, and the principle of equality of rights is to be applied with even-handed justice, but without unnecessary extension beyond its legitimate purview. It is not, therefore, with sole regard to the wishes or conceptions of ideal justice of colored persons, nor only with deference to the prejudices or abstract convictions of white persons, that a practical adjustment is to be reached, but with enlightened regard to the best interests and harmonious relations of both, constrained by long past events for which none now living are responsible to make their habitations and support themselves as best they can under the same government.

The disposition of a delicate and important question of this character, weighted with embarrassments arising from antecedent legal and social conditions, should aim at a result most likely to conduce to peace and order, and to preserve the self-respect and dignity of citizenship of a common country. And, while the mandate of the statute must be our paramount guide, we may be assisted by the knowledge familiar to all of past and present circumstances relating to our diverse population, and such lights of reason and experience as surround the question, in giving effect with the least amount of friction to the purposes of the law.

It being manifest upon the facts of this case that by the discrimination between white and colored passengers, and the character of accommodations furnished to colored passengers, the petitioner was subjected to unjust prejudice and disadvantage in violation of the statute, the duty of the Commission might be regarded as performed in so deciding, leaving the carrier to make such changes as it might deem appropriate.

But the arguments at the hearing and the subject itself authorize, if they do not demand, further consideration. If, as is claimed by the defendant, a public sentiment exists in the State of Georgia, and in some other states where the colored

population is proportionately large, that renders separation of passengers on the ground of color expedient, either as a safeguard against disturbance or for other good reasons, it is obvious that the cars for the two colors should be equal in their comforts and accommodations, and that colored travelers should have no occasion for contrasting unfavorably their mode of transportation with that of white travelers in the same train, where both pay the same price for carriage. Nothing less than this will comply with the plain requirement of the law. When a carrier, for any cause not founded on misconduct or disease that may be offensive or infectious, assumes the right to separate in different cars passengers who pay the same fare, he takes the responsibility of furnishing equality of accommodations and of protection from molestation.

A rule requiring separation of passengers invites officious interference to enforce it by meddlesome persons who, impelled perhaps by strong prejudices and unmindful of the rights of others, are doubtless less considerate and law-observing in their self-appointed service than the authorized employees of the carrier in the responsible discharge of their duty. If, therefore, the rule is sought to be justified, it can only be done by showing that adequate protection is afforded to colored passengers against assaults and indignities, and that the equality in separate cars is real and not delusive.

It is not surprising that it appears to colored persons as irony to be put in a badly furnished car, popularly designated as a "Jim Crow car," of which only half is at their service, with liability to interruptions and annoyances, and to call that equality of comfort and accommodations. It is said in behalf of the defendant that the company is not responsible for the reproachful designation of the car. That doubtless is so, but the defendant is responsible for the character of the car and the manner in which it is used. Educated and reputable colored persons, like the petitioner, have reason, therefore, for complaining that under such conditions of transportation they are not furnished the just and equal accommodations for which they pay and to which they are entitled under the law.

To what extent a public sentiment prevails that renders separation in different cars desirable does not appear. Whether it is general or local the testimony in this case does not show. The practice, however, of maintaining the separation by assigning colored passengers to a segment of a car inferior in its appointments, while charging them first-class fare is one that violates the plain provisions of the law and is manifestly unjust.

In many states where railroad travel is large and colored persons less numerous, no separation or distinction is made, but passengers paying the same fare occupy the same cars in common, and questions of discrimination or disputes on the ground of color do not occur.

In South Carolina, according to the evidence and as was alleged in argument, in the states of Virginia and North Carolina, where the colored population is large, no separation is made, but two classes of cars are provided with some difference in the fare corresponding with the quality of the car, and persons of both colors may purchase tickets for and ride in either class of car, according to their inclination or ability to pay, and it is said that the method works well and is generally satisfactory. A method like this does not appear to be in violation of the law.

The argument in behalf of the petitioner was directed largely to the obliteration of all distinctions in transportation and forcibly urged identity of white and colored passengers paying the same fare as the only absolute equality under the law. The case of *Railroad Company v. Brown*, (17 Wall., 445) was cited as supporting this proposition. That case arose under special acts of Congress applying to the Alexandria and Washington Railroad Company, chartered by the State of Virginia, by which the company was authorized to extend its road into the District of Columbia and to connect with the Baltimore and Ohio railroad. The privilege was accompanied with the provision "that no person shall be excluded from the cars on account of color."

The company provided separate cars for white and colored passengers, claimed to be equally good, and charged the same fare for either car. A refusal by the company to permit a

colored passenger to ride in a car with white passengers was held by the court to be a violation of the enactment "that no person should be excluded from the cars on account of color." Assuming that provision to have been properly interpreted (although the court concedes that the words taken literally might have borne the interpretation put upon them by the railroad company), it is not decisive of the point presented under a statute materially different.

The statute governing this case declares to be unlawful and forbids undue or unreasonable preference or advantage to any person or the subjection of any person to any undue or unreasonable prejudice or disadvantage.

It by no means follows that separation into cars of equal quality and where the same protection is accorded is undue preference to one class of passengers or undue prejudice to the other class. Circumstances and conditions may exist to justify such separation, and it may be in the interest of both that it should be done.

The same section applies the same principles to the transportation of property as to persons, but no one would seriously insist that the statute requires all property of the same kind or all kinds of property to be carried in the same car. If like property receives like transportation and at like rates, the carrier's duty in that regard is performed. The number of cars used for the purpose is immaterial.

Identity, then, in the sense that all must be admitted to the same car and that under no circumstances separation can be made, is not indispensable to give effect to the statute. Its fair meaning is complied with when transportation and accommodations equal in all respects and at like cost are furnished and the same protection enforced.

The order of the Commission on the facts of the case is, that the Georgia Railroad Company, by requiring the petitioner to occupy a seat in a half car deficient in comforts and conveniences, subjected him to undue prejudice and disadvantage in violation of the third section of the Act to Regulate Commerce, and that the said railroad company cease and desist from subjecting colored passengers to such undue and unreasonable prejudice and disadvantage, and that so long as

its rule separating passengers is maintained its duty is to furnish for all passengers paying the same fare, cars in all respects equal and provided with the same comforts, accommodations, and protection for travelers.

THE BOSTON CHAMBER OF COMMERCE *v.* THE LAKE SHORE AND MICHIGAN SOUTHERN RAILWAY COMPANY, THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, AND THE BOSTON AND ALBANY RAILROAD COMPANY.

THE SAME *v.* THE LAKE SHORE AND MICHIGAN SOUTHERN RAILWAY COMPANY.

THE SAME *v.* THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY.

Hearing for taking testimony, October 27, 28, 1887.

Hearing for argument, November 17, 1887.

Briefs submitted in December, 1887.

Decided February 15, 1888.

The relative reasonableness of rates on shipments from western points to cities on the Atlantic Seaboard is to be determined by all the circumstances and conditions that affect the traffic to the respective points between which the rates are questioned, and not solely by one standard of comparison.

The length and character of the haul; the cost of the service; the volume of business; the conditions of competition; the storage capacity and the geographical situation at the different terminal points, are all elements of importance, bearing upon the relative reasonableness of the respective charges for transportation.

The fact that the export rates through Boston, and the rates on merchandise intended for coast-wise points east of Portland, and the west-bound rates from Boston, have been made by the carriers the same as corresponding New York rates, in order to put Boston on an equality with New York and other Seaboard cities, wherever Boston is a competitor with those cities, is not controlling in determining the reasonableness of east bound Boston local rates on a traffic in which there is no competition by other cities.

In view of the longer haul to Boston than to New York; the greater cost of transportation to Boston; the very much greater volume of business to

and from New York; the competition by water transportation by the Lakes, Erie Canal and Hudson River, and also by several railroad lines; and the geographical and commercial advantages of New York; the differentials on Boston local rates of ten cents per hundred pounds on the first and second classes of merchandise, and of five cents per hundred pounds on the four other classes, between New York and Boston, on traffic originating west of Buffalo, have not been shown to be unjust or unreasonable, or to constitute unjust discrimination against Boston.

Hon. William Gaston and C. L. B. Whitney, for petitioners.

Geo. C. Greene, for Lake Shore and Michigan Southern Railway Company.

Frank Loomis, for New York Central and Hudson River Railroad Company.

Samuel Hoar, for Boston and Albany Railroad Company.

REPORT AND OPINION OF THE COMMISSION.

SCHOONMAKER, *Commissioner* :

These three cases, although against separate carriers, involve one ground of complaint relating to joint through rates, and the petitions and answers being substantially alike the issues are properly disposed of in a single trial and decision.

The general complaint presented by the petitions is that the joint through rates of the defendant carriers from Chicago and some other western points to Boston are disproportionately higher than the joint through rates of the two first-named carriers to New York city and higher than the export rates made by the three carriers over the same line to East Boston, and that by reason of such higher Boston rates the defendants have violated the first, second, and third sections of the Act to Regulate Commerce.

The specific complaint is that the rates from Chicago, from Elkhart, Ind., from Toledo, Cleveland, Painesville, and Ash-tabula, Ohio, and from Girard, Penn., on the first and second classes of merchandise to Boston are 10 cents a hundred pounds higher than to New York, and on the third, fourth, fifth, and sixth classes of merchandise are 5 cents a hundred pounds higher from the same points to Boston than to

New York, and that the export rates through East Boston and the coastwise rates to points east of Portland, Me., are also less than the Boston rates, being the same as New York rates. The petitions charge that these differences in rates are not founded upon nor warranted by the difference in distance nor the actual cost of transportation, and are, therefore, unreasonable and unjust, and are an unjust discrimination against Boston and give undue preference and advantage to New York.

The answers do not contest the differences in the rates specified, but controvert the allegations that the Boston rates are unreasonable and unjust or that they unjustly discriminate against Boston or give undue preference and advantage to New York, and justify the differences on the ground of competition with water carriers and other carriers at New York, by which rates are fixed to which the defendants must conform, and allege that these rates as well as the export rates through East Boston and the coastwise rates to points east of Portland are for the transportation of merchandise under circumstances and conditions dissimilar to the transportation terminating at Boston.

The testimony adduced, a large part of which consists of agreed statements and illustrations, has taken a wide range, showing the various competing carriers from Chicago to points on the Atlantic coast and to Boston and their rates, the division of through rates among the defendants, the business of Boston and New York, respectively, and the circumstances that are claimed to affect the rates of transportation.

The facts proven and admitted are too voluminous to be set forth in full, but those deemed material for a disposition of the questions involved are as follows :

FACTS FOUND.

The petitioner is one of several societies in the city of Boston, having a membership of about 829 merchants, engaged in the flour, grain, provision, and other business in that city. The society has authority to bring this proceeding, and its members are interested in the business which is the subject-matter of the controversy.

The Lake Shore and Michigan Southern Railway Company owns and operates a line of road extending from its western terminus, at Chicago, through the States of Illinois, Indiana, Michigan, Ohio, Pennsylvania, and New York to Buffalo, its eastern terminus. The New York Central and Hudson River Railroad Company owns and operates a line of road which runs from Buffalo, its western terminus, where it connects with the road of the first-named company, to Albany, on the Hudson river, and thence by way of East Albany, on the opposite side of the river, and connected with Albany by a bridge over which the line is operated, southerly along the Hudson river to its southern terminus, at the city of New York.

The Boston and Albany Railroad Company owns and operates a line of road which runs through New York and Massachusetts from its western terminus, at East Albany, where it connects with the road of the last above-named company, to its eastern terminus at Boston.

The three respondent railroads thus form by connection with each other a through railroad line from Chicago to Boston, and the two first-named respondents also form a through railroad line from Chicago to New York, and the said lines, respectively, have established joint tariffs of rates, fares, and charges for such continuous lines, and each of said companies operates its own road.

Before and since the Act to Regulate Commerce took effect the first two respondent railroads have been largely engaged in transporting from Chicago to New York, by continuous carriage and under a joint arrangement as to through rates, the issuance of bills of lading, and the interchange of cars, large quantities and varieties of merchandise, which have, since the Act to Regulate Commerce took effect, been divided into six different classes in the traffic tariffs.

The length of the entire haul from Chicago to New York is, for purposes of division, taken at 984 miles, made up as follows :

L. S. and M. S., Chicago to Buffalo.....	538 miles.
N. Y. C. and H. R., to New York.....	446 "

Actual distance from Chicago to New York.....	981 miles.
L. S. and M. S., Chicago to Buffalo.....	540 “
N. Y. C. and H. R., Buffalo to East Albany.....	299 “
N. Y. C. and H. R., East Albany to New York.....	142 “

The haul from Chicago to New York via the Pennsylvania Company's line, for purposes of division, is 920 miles to Jersey City.

During the same period the three respondent railroads have also been largely engaged in transporting from Chicago to Boston by continuous carriage and under a joint arrangement as to rates, issuance of bills of lading, and interchange of cars, the same several classes of merchandise.

The entire haul from Chicago to Boston is 1040 miles, for purposes of division made up as follows :

L. S. and M. S., Chicago to Buffalo.....	538 miles.
N. Y. C. and H. R., Buffalo to East Albany.....	501 “
Boston and Albany, East Albany to Boston.....	201 “
Actual haul Chicago to Boston.....	1040 “
L. S. and M. S., Chicago to Buffalo.....	540 “
N. Y. C. and H. R., Buffalo to East Albany.....	299 “
Boston and Albany, East Albany to Boston.....	201 “

In the tariff classification flour and grain in car-load lots are in the sixth class ; in less than car-load lots in the fifth class ; provisions, such as salted meats, pork products, etc., in car-load lots in the fifth class ; in less than car-load lots in the fourth class ; butter and eggs in the second class, and cheese in the third class.

The joint rates and charges fixed whereby the respondents under the arrangements between them for the through transportation per hundred pounds for the several classes of merchandise from Chicago to New York and from Chicago to Boston, respectively, are as follows :

CLASS.	TO NEW YORK.	TO BOSTON.	CLASS.	TO NEW YORK.	TO BOSTON.
1st.....	75	85	4th.....	35	40
2nd.....	65	75	5th.....	30	35
3rd.....	50	55	6th.....	25	30

These rates when extended to a car-load lots of flour and grain (sixth class), averaging 30000 pounds per car, result as follows :

Freight per car Chicago to New York.....	\$75 00
Freight per car Chicago to Boston.....	90 00

The additional transportation charged to Boston of 10 cents per hundred pounds for the first two classes and of 5 cents per hundred pounds for the four other classes over the New York rates for like kinds of merchandise is an extra fixed charge or arbitrary which has for many years been added to the New York rate in fixing the Boston rate, irrespective of the amount of the New York rate.

The term arbitrary is a technical term expressing a difference which does not change with the through rate, and similar arbitrary differences have for years prevailed at Montreal, Philadelphia, and Baltimore, of 2 cents at the first two cities and 3 cents at the last-named less than the New York rate.

For west-bound freight no additional charge for transportation from Boston to Chicago over the rate from New York to Chicago has for several years been made, but the rates from both cities have been the same; and since the Act to Regulate Commerce took effect the rates for west-bound freight, both from Boston and New York, have been the same as the east-bound rates from Chicago to New York for the different classes.

The through rates which under the agreement between the roads are charged for the transportation of the different classes of merchandise from Chicago to New York and to Boston, respectively, are collected from the shipper or consignee, as the case may be, in a lump sum; and the moneys so collected are distributed among the roads according to certain percentages or divisions fixed upon between them, based upon the distances taken for that purpose, before stated, and not upon the actual mileage of the respective roads. These percentages or divisions of the through rates are shown in detail by the testimony, but are not deemed material, and are therefore omitted from these findings.

The distance by the Pennsylvania railroad and its connections to the points reached by it are as follows :

Chicago to Philadelphia.....	830 miles.
Chicago to New York.....	920 “
Chicago to Boston.....	1252 “

The rates by the Pennsylvania lines to Philadelphia from Chicago are 2 cents less per hundred pounds, or \$6.00 per car-load of 30,000 pounds, than to New York, and the rates by these lines to New York city and to Boston, respectively, are the same as by the respondents' lines.

The Merchandise intended for New York and the merchandise intended for Boston are in their transportation from Chicago to East Albany carried over the same lines and the same distances.

Since the Act to Regulate Commerce went into effect the three respondent carriers have also, under through bills of lading from Chicago to Liverpool and other foreign ports, been largely engaged (under a joint arrangement for rates between themselves and steamship companies or vessels performing ocean carriage from Boston) in transporting the various classes of merchandise, but more especially flour and grain, over their respective roads from Chicago to East Boston, where the merchandise has been transferred to vessels or steamships, which have then carried the same to the foreign ports of destination.

East Boston is the water terminus of the Boston and Albany road, and is reached by the Grand Junction branch of that road, which leaves the main line at Cottage Farms, in the town of Brookline, and is 6 miles farther than Boston, but for purposes of division of the through rate it is allotted as 20 miles, giving a constructive mileage to the Boston and Albany from East Albany to East Boston of 221 miles.

Upon the goods transported to East Boston for export purposes the rate received by the three carriers as their share of the through rate from Chicago to Liverpool has been at all times since the Act to Regulate Commerce took effect less than the rates charged by them for like merchandise to Boston proper or to points on the Boston and Albany road west of the Grand Junction at Cottage Farms, and for the greater part of the time the rate on export business to East Boston has been the same as the rate to New York. Flour and grain in car-loads to East Boston for local use are charged the regular Boston rate of 30 cents per hundred pounds.

Since the 30th of April, 1887, the said carriers, under an

arrangement between them, have allowed upon merchandise transported over their roads from Chicago to Boston or East Boston, and which has paid the regular Boston tariff rates and which has afterward, by subsequent determination of the owner, been re-shipped to Liverpool or other foreign ports, a rebate or allowance of 10 cents per hundred pounds on the first two classes and of 5 cents per hundred pounds on the other classes of merchandise, equalizing them with the New York rates, and such rebates have been equal and impartial, without discrimination **between** persons engaged in foreign traffic. In such cases of re-shipment from Boston all wharfage charges, if any, are paid by the shipper, and there are no lighterage charges.

The said three carriers, since the Act to Regulate Commerce took effect, have also, under an arrangement between them, allowed upon merchandise originally transported over their roads from Chicago to East Boston and thence by continuous shipment (or to Boston and thence by subsequent reshipment) carried by water to any ports in the State of Maine east of Portland a through rate or rebate precisely the same as in the case of merchandise billed through for foreign ports, but when such merchandise has been carried by rail or shipped by water to any other points in the United States, either on the coast or in the interior, no such through rates or allowances have been made.

Since the Act to Regulate Commerce went into effect the respondent roads have also been engaged in the transportation of the several classes of merchandise, both eastward and westward, between New York and Boston, respectively, and the following places, viz: Elkhart, in the State of Indiana; Toledo, Cleveland, Painesville, and Ashtabula, in the State of Ohio, and Girard, in the State of Pennsylvania; and in such transportation the same difference of 10 cents and 5 cents per 100 pounds, respectively, between the New York rate and the Boston rate for east bound freight has been maintained by the respondent roads, as also the same system of special rates and of allowances or rebates in the case of such merchandise carried beyond Boston, as before set forth. The same facts and reasons exist for the justification or the

contrary of said differences as in the case of shipments from Chicago. Numerous points in New England are reached by railways branching from the Boston and Albany railroad between Albany and Boston. Merchandise carried from Chicago and other western points for Boston and New England points goes by other lines than the respondent roads, namely, the Pennsylvania railroad, the New York, Lake Erie and Western railroad, the Delaware, Lackawanna and Western railroad, the Grand Trunk railway. The lines herein referred to are all members of the Trunk Line Association.

The rates from Chicago to New York by the several all-rail routes are the same. The rates from Chicago to Boston by the several all-rail routes are 5 cents above the New York rates on the third, fourth, fifth, and sixth classes, and 10 cents higher on the first and second classes. The all-rail routes to Portland, Me., by the roads over which the through rates are made, are the same as to Boston. The rates to Montreal and to Philadelphia by the several all-rail routes are 2 cents per hundred pounds lower than to New York. The rates to Baltimore and to Newport News by the several all-rail routes are 3 cents per hundred pounds lower on all classes than to New York. The rates of transportation by the lakes and other water-ways are at all times lower than the rates by all-rail routes.

On portions of the shipments to New York harbor and to East Boston there are lighterage and some wharfage charges, which are as follows :

On shipments to points in New York harbor, other than New York Central road stations, 3 cents per cwt. lighterage. On shipments to East Boston for export, via Warren line, $\frac{1}{2}$ cent per bushel lighterage on grain, and on shipments to Boston for export by four other lines a lighterage charge of $\frac{3}{8}$ cents per bushel and wharfage charge of $\frac{1}{2}$ cents per bushel on corn and wheat ; also at Boston a lighterage charge on flour of 45 cents per gross ton, and wharfage charge of 1 cent per sack of 140 pounds ; and on bacon a lighterage charge of 45 cents per gross ton and wharfage charge of 3 cents per box of 600 pounds.

The lighterage and wharfage charges constitute part of the

through rate, and are borne by the carrier and not by the shippers, and they are deducted before division of the through rates among the respective carriers.

After deducting lighterage and wharfage charges, the earnings of the Lake Shore and Michigan Southern and New York Central and Hudson River roads from Chicago to New York, New York harbor, and Albany on car-load shipments of 30,000 pounds are as follows :

Lake Shore, on corn, wheat, and flour, to New York.....	\$41 00
Lake Shore, on corn, wheat, and flour, to New York harbor.....	36 08
Lake Shore, on corn, wheat, and flour, to Albany, local.....	46 22
Lake Shore, on bacon, 28,000 pounds, to New York.....	45 92
Lake Shore, on bacon, 28,000 pounds, to New York harbor.	41 33
Lake Shore, on bacon, 28,000 pounds, to Albany, local.....	50 33
New York Central, on corn and flour, to New York.....	23 04
New York Central, on corn and flour, to New York harbor.....	20 28
New York Central, on corn and flour, to Albany, local.....	25 78
New York Central, on bacon, 28,000 pounds, to New York.....	25 81
New York Central, on bacon, 28,000 pounds, to New Yorks harbor..	23 23
New York Central, on bacon, 28,000 pounds, to Albany, local.....	28 06

The earnings of the three carriers, respondents, on shipments from Chicago to Boston in like car-loads, after deducting lighterage and wharfage, are as follows :

Lake Shore, on corn, to Boston.....	\$46 56
“ “ East Boston, export.....	26 71
“ “ “ “	35 02
“ wheat to Boston.....	46 56
“ “ East Boston, export.....	36 79
“ “ “ “	35 20
“ flour to Boston.....	46 56
“ “ East Boston, export.....	38 06
“ “ “ “	33 92
“ bacon to Boston.....	50 70
“ “ East Boston, export.....	42 63
“ “ “ “	39 08
New York Central, on corn to Boston.....	26 05
“ “ East Boston, export.....	20 54
“ “ “ “	19 59
“ flour to Boston.....	26 05
“ “ East Boston, export.....	21 80
“ “ “ “	18 98
“ bacon to Boston.....	28 80
“ “ East Boston, export.....	23 80
“ “ “ “	21 87

Boston and Albany, on corn to Boston.....	17 40
“ “ “ East Boston, export.....	15 08
“ “ “ “ “	14 38
“ “ wheat to Boston..	17 40
“ “ “ East Boston, export.....	15 11
“ “ “ “ “	14 46
“ “ flour to Boston.....	17 40
“ “ “ East Boston, export.....	15 64
“ “ “ “ “	13 94
“ “ bacon to Boston.....	18 94
“ “ “ East Boston, export.....	17 51
“ “ “ “ “	16 05

The difference in the divisions of the export rates through East Boston is occasioned by the difference in the charges for lighterage and wharfage, deducted before division.

The rates charged by the defendant carriers are as low as the rates by any other all-rail route from Chicago to Boston.

The cost of service from Chicago to Boston exceeds the cost of service to New York more than is accounted for by the increase in distance by reason of the fact that the grades on the Boston and Albany railroad are heavy, while there are practically no grades between Albany and New York, and the further facts that the cost of coal is greater to the Boston and Albany Railroad Company than to the New York Central and Hudson River Railroad Company, and more is consumed and more engines and train crews are used in handling an equal number of cars. Trains destined for Boston and New England points are also broken up at Albany and hauled over the Albany bridge by a switch-engine to East Albany and made up into trains on the Boston and Albany road.

Merchandise sent by rail from Boston to Chicago and other western points mentioned in the petition is sold by merchants and manufacturers of Boston and New England in competition with similar merchandise sent from New York by merchants and manufacturers there, and with similar merchandise sent from other eastern cities, ports of entry, and States.

Chicago and the other western points aforesaid are common markets in which merchants and manufacturers of all

eastern cities, ports of entry, and States engage in competition. Various lines of ocean steamers and other vessels ply between Boston and foreign ports. Boston is the second port of entry in importance in the United States, and the value of its imports for the year 1886 was \$58,430,707.00.

Much of the merchandise imported into the United States seeks a western market, and to accord equality of competition receives as low a rate from Boston to that market as prevails at New York.

Much of the merchandise imported consists of raw material used in the manufactories of New England and there manufactured and sent west for sale. These manufactories are some of them situated at points along the line of the Boston and Albany railroad and its connections, many of which points are also reached by the transportation routes leading from New York.

The receipts of grain and flour at New York during a period of seven months, from April 1 to October 31, in the years 1886 and 1887, were as follows :

1886.	Grain.....	65,958,263 bushels.
"	Flour.....	3,206,008 "
1887.	Grain.....	65,492,262 "
"	Flour.....	3,378,520 "

The proportions of the grain so received that came by rail and by water transportation were as follows :

1886.	By rail.....	29,038,708 bushels.
"	" water.....	36,919,555 "
1887.	" rail.....	27,721,262 "
"	" water.....	37,772,000 "

The present rates on first and sixth class merchandise from Chicago and some other western cities to New York and Boston, and also what the rates to Boston by different routes would be if computed on the rate per mile charged by the Pennsylvania short line, are as follows :

From Chicago (distance via Pennsylvania railroad, 920 miles to New York ; 1,252 to Boston) :

Present rate to New York.....	1st class, 75 ;	6th class, 25
" " " Boston.....	" 85 ;	" 30

To Boston, computed via Boston and Albany railroad.....	“	85;	“	.28
To Boston, computed via Pennsylvania railroad	“	102;	“	34

From Cincinnati (distance via Pennsylvania railroad, 765 miles to New York; 1,097 to Boston):

Present rate to New York.....	1st class,	65;	6th class,	21½
“ “ “ Boston.....	“	75;	“	26½
To Boston, computed via Boston and Albany railroad.....	“	79;	“	26
To Boston, computed via Pennsylvania railroad.	“	93;	“	31

From East St. Louis (distance via Pennsylvania railroad, 1,071 miles to New York; 1,403 to Boston):

Present rate to New York.....	1st class,	87;	6th class,	29
“ “ “ Boston.....	“	97;	“	34
To Boston, computed via Boston and Albany railroad.....	“	100;	“	33
To Boston, computed via Pennsylvania railroad.	“	114;	“	38

From Louisville (distance via Pennsylvania railroad to New York, 875 miles; 1,038 to Boston):

Present rate to New York.....	1st class,	75;	6th class,	25
“ “ “ Boston.....	“	85;	“	30
To Boston, computed via Boston and Albany railroad.....	“	89;	“	30
To Boston computed via Pennsylvania railroad.	“	104;	“	35

The total receipts of grain and flour expressed in bushels received at the five Atlantic cities of New York, Philadelphia, Baltimore, Boston and Montreal during the year 1886 were 249,062,939 bushels, the amount exported 150,383,499 bushels, and the percentages of the amounts so received and exported, were as follows:

New York received	52.5;	exported	47.4.
Philadelphia	“ 8.7;	“	6.7.
Baltimore	“ 15.6;	“	21.4.
Boston	“ 14.4;	“	10.8.
Montreal	“ 8.8;	“	18.7.

The amount of grain only received at the same cities during the same time was 187,263,713 bushels, the amount exported 110,795,038 bushels, and the percentages of the re-

spective amounts received and exported by the several cities were as follows :

New York	received	55.7;	exported	49.8.
Philadelphia	"	8.7;	"	7.4.
Baltimore	"	16.1;	"	22.2.
Boston	"	10.4;	"	5.8.
Montreal	"	9.1;	"	14.8.

These percentages have not been uniform in different years, but have fluctuated somewhat during the last ten years, and have decreased more at Philadelphia than elsewhere. The number of steamers sailing monthly from New York and plying between that city and various foreign ports is 115, with a total carrying capacity of 263,200 tons, aggregating for a year 1,380 steamers and 3,178,400 tons capacity, to which it is claimed may safely be added 10 per cent. of tonnage for coast lines, tramp vessels, &c. The number of steamers sailing from Boston to foreign ports for the year ending September 30, 1887, was 235, and to provincial ports 357; total, 792. The tonnage was not shown.

The rates from Chicago to New York on wheat and corn by lake and canal from May 2 to October 22, 1887, averaged on wheat about 9 cents per bushel, including elevation, and on corn a little less. The rates by lake and rail were nearly uniform, at 12 cents per bushel on wheat and 11 1-5 on corn, while at the same time the rates by all-rail on wheat were 15 cents a bushel and 14 cents on corn.

There are fourteen lines or routes of transportation from southern and western points through Chicago to New York, including one water line by way of the lakes, Erie canal, and Hudson River. An equal number of lines or routes reach Boston, all of them rail routes east of Buffalo.

The foreign commerce of the port of New York for the fiscal year ending June 30, 1886, was \$802,535,015, and the foreign commerce of all the other ports of the United States for the same time was \$1,426,018,032.

The value of the domestic exports from the city of New York for the fiscal year ending June 30, 1886, was \$346,412,339.

The value of the domestic exports from the city of Boston for the same time was \$53,429,513.

The values of the domestic exports from all the ports of the United States, except New York, for the same time were \$371,476,307.

The tonnage of the Erie canal, arriving at tide water, for the year 1886 was as follows :

Tonnage from Western States.....	1,525,901 tons.
Tonnage from New York State.....	924,130 "
<hr/>	
Total by Erie canal.....	2,450,031 "

And the estimated value of the property transported on the Erie canal for the same year was \$163,726,849.

The through rate from Chicago to Boston is a little less than 6 mills per ton per mile, and all other rates to the points north and west of Boston on the main line by which they reach Boston are the same as Boston rates.

OPINION AND CONCLUSIONS.

The facts recited sufficiently indicate the differences in rates between New York and Boston of which complaint is made and the reasons for the differences that have weight with the railroad carriers. Other facts also appeared in evidence to which passing reference may be made. The complaint relates solely to the east-bound rates from Chicago and some other western points to Boston proper.

The export business through Boston and for shipments to points east of Portland and for all west-bound business the Boston rates are on an equality with New York rates, and no ground of complaint exists that Boston is discriminated against in respect to those rates. The general fact is thus apparent that for the business in which Boston is a competitor with New York, both export and west-bound, the rail rates for both cities are equal, and in that respect neither city has any advantage over the other. Except in the particulars mentioned Boston is upon a substantial equality of rates with all the cities that are its competitors on the Atlantic seaboard.

Complaint is not made that the Boston export rates and the coastwise rates to points east of Portland are unlawful

under the fourth section of the Act, and they are conceded on the part of the petitioners to be necessary to enable Boston to participate in the foreign and coastwise trade ; but the fact of such lower rates and the lower west-bound rates is pressed as a strong argument that the east-bound Boston local rates are unjust and should be reduced to the export rates.

The export and coastwise rates through Boston not being assailed in this proceeding, the question of their lawfulness is not now before the Commission. The complainants in their brief disclaim any desire to disturb the export rates in these words : "The petitioner wishes, however, it distinctly understood that while it appeals to the facts connected with the Boston export trade as proving that the Boston local arbitrary is unreasonable, it does not wish in any way, directly or indirectly, injuriously to affect the foreign commerce of the port of Boston, and it therefore does not ask an order enjoining the continuance of such export rate or of the export rebate system ; its only desire in this regard is that the local rate shall at all events be made as low as the export rate, as it is in all other Atlantic seaboard cities save Portland."

After such an explicit withdrawal of any question affecting the lawfulness of the export rates and rebates the Commission is not required to pass upon them in this case. It is obvious that an adjudication upon those rates requires additional parties to the record and an opportunity to be heard on the part of the various business interests likely to be affected by any determination reached. Although incidental reference is made to those rates no decision is rendered upon them and no opinion relating to them is intended to be expressed.

The sole question for determination is whether the east-bound rates to Boston, which are 10 cents per hundred weight higher on the first and second classes of merchandise and 5 cents per hundred weight higher on the third, fourth, fifth and sixth classes, on shipments originating west of Buffalo, are unjust and unreasonable, and therefore unjustly discriminate against Boston.

The claim of the petitioners is that the Boston local rates shall be made as low as the export rates; in other words, that they shall be on equality with the New York rates. A claim of this character, if made as matter of right and not of favor, should be founded upon a corresponding equality or substantial similarity of circumstances and conditions that control the making of rates by carriers, and to some extent their effect upon the business of localities.

If differences in the conditions of the traffic to two or more points exist which materially affect the cost or the value of the service it would scarcely be reasonable to require a carrier to disregard those differences and make good to every community disadvantages of situation or other disadvantages. As has been well said, "Different localities are more or less favored, in regard to transportation facilities, either by nature or the enterprise of man. It cannot be maintained that it is the duty of the common carrier to equalize these existing inequalities at his own expense. All that is required of him is not to create them himself arbitrarily. He must treat all alike that are situated alike, but he cannot be bound to wipe out existing differences. He may be obliged to carry freight at a lower rate to some localities than to others, but this in itself does not constitute an injustice or injury to the shipper in a less favored locality so long as the charges are reasonable in themselves and alike to all in the same situation." With the qualification indicated in the case of *The Board of Trade Union of Farmington, etc.*, against *The Chicago, Milwaukee and St. Paul R. R. Co.* (1 Interstate Com. Rep., 215), that rates should be relatively reasonable when the same carrier transports over different branches of its road to a common market, these principles may be accepted as correctly stated.

The contention of the petitioners for equality of rates with New York is not supported by equality of distance, of cost of service, or by other considerations, such as volume of business, competition of rail and water ways, ocean service, terminal facilities, and storage capacity—all elements of more or less importance in the determination of rates, and some of them of controlling influence.

The argument of the petitioners is based almost entirely

upon the distances hauled and the assumed parity of cost of service, and elaborate calculations founded on distances by various lines have been produced showing the through rates to different seaboard cities from initial western points, the divisions of through rates among connecting carriers, the lighterage expenses at New York, and other incidental matters. It appears from these statistics that the Lake Shore and Michigan Southern road and the New York Central to Albany receive each a slightly higher amount of the through Boston local rate than of the through rate to New York; but as the contention is with the through rate to Boston as a unit, the divisions of that rate and the proportions received by the respective carriers forming the line are unimportant for the purposes of this case. The lighterage charges at New York are also irrelevant to the question to be determined. They are part of the rate paid by the shipper to that city, and, when necessary upon a portion of the merchandise handled there, are borne by the carriers as an element of transportation expenses. They are not separable from the aggregate rate for the purpose of any question involved in this decision. The total charge for transportation is all that concerns the shipper, and not the percentages allotted by agreement to one or more of the connecting carriers in a through line. Carriers voluntarily enter into agreements for through shipments over connecting roads, and the division of the through rate is part of their mutual agreement which the parties to the arrangement adjust for themselves and the adjustment of which does not affect the shipper. Such adjustments may not be on the exact basis of cost of service in any case, and many other considerations may influence the parties in making them. The fact may be, therefore, that the Lake Shore road and the New York Central road may each receive more in amount of the through rate to Boston from Chicago than to New York for the respective hauls to Albany, although the service to that point is identical, but the through rates are charged for the entire haul to the final destination and are not governed by the service to some intermediate point in the line or where the line diverges to different destinations.

The element of cost of service which may at one period have been recognized as controlling in fixing rates has long ceased to be regarded as the sole or the most important factor for that purpose. The value of the service with respect to the articles carried, the volume of business, and the conditions and force of competition are justly considered to have controlling weight in determining the charges for transportation. But even with regard to the cost of service the cost is at least somewhat greater to Boston than to New York.

The large trains drawn by one engine over the easy routes of the Lake Shore and New York Central roads are broken up at Albany, taken over the Albany bridge, and switched to the tracks of the Boston and Albany road, and on account of the heavy grades of that road are made up into much smaller trains, requiring more engines, additional consumption of coal, and a greater number of trainmen. The detention of cars at Boston and in New England is also somewhat greater than at New York. These are items that enter into the cost of service, and, though they may not be large, they affect it to a material extent.

The distance to Boston is also 56 miles greater. One of the tables put in evidence by the petitioners gives a computation of the proportional rates to New York and Boston based on distance alone, the distances being, respectively, 984 miles to New York and 1,040 to Boston, with the following showing :

CLASS.	NEW YORK.	BOSTON.	BOSTON PROP'L.	DIFFER.
1st.....	75 cents.	85 cents.	79.8	5.7
2d.....	65 "	75 "	68.7	6.8
3d.....	50 "	55 "	52.9	2.1
4th.....	35 "	40 "	37.0	3.0
5th.....	30 "	35 "	31.7	3.3
6th.....	25 "	30 "	26.4	3.6

This calculation leaves only a small margin to be made up by the other elements that affect the relative reasonableness of the rates to the two cities.

The volume of business to Boston as compared with that to New York, in view of the universally accepted principle of railroad transportation that a very large traffic can be profitably conducted at lower rates than a relatively small traffic,

furnishes a substantial ground, supported by adequate business reasons, for differences in rates that might be urged to justify to a great extent the existing disparity.

Of the grain and flour received at the six principal Atlantic ports from the west during the year 1886 New York received 52.5 per cent.; Boston received 14.4 per cent.; and of the amount of exports of these articles from the same cities New York exported 47.4 per cent.; Boston exported 10.8 per cent. The number of bushels represented by these percentages was, for New York, 84,681,399; for Boston, 35,865,063, or more than two and one-third times the amount. Other articles, such as tobacco, cheese, bacon and hams, beef and pork, lard and tallow, and petroleum have even larger disproportions. And the general export and import trade of the two cities, as some indication of the relative volume of railroad traffic, were as follows:—

For the fiscal year ending June 30, 1886:

Domestic exports from New York.....	\$846,412,830
“ “ “ Boston	58,429,513

For the preceding seven years the exports were considerably larger at both cities.

For the fiscal year ending June 30, 1886:

Imports at New York.....	\$434,548,789
“ “ Boston.....	58,552,702

These statistics in a general way are sufficient illustrations to show that the difference in quantity is a factor of large importance.

But another and more important element in justification of the differences in favor of New York is found in the competition that centers there. Besides the several all-rail lines that reach New York, the Baltimore and Ohio, the Pennsylvania, the New York, Lake Erie and Western, the Delaware, Lackawanna and Western, the West Shore, and others, the water competition by way of the Lakes, Erie canal, and Hudson river is alone a factor of so much force as to compel a lower rate to New York than perhaps the all-rail carriers would be willing to accept save for that reason. The business,

by the lakes and canal is so large and the rates so low that the rail carriers in their competition for the traffic must look for their profits to the bulk of the business done rather than to the rate of compensation for the service rendered. The tonnage arriving at tide-water at New York by the Erie canal in 1886 was 2,450,031 tons, of which 1,525,901 was from the Western States. The tonnage going from tide-water at New York by the Erie canal during the same time was 1,130,192 tons. The flour and grain alone received at New York in 1886 by canal was, in bushels, 43,835,077 ; by rail, 84,681,399.

The number of bushels received in Boston during the same time, by rail, was 35,865,063, or about eight million bushels less than the canal brought to New York. The relative percentages at New York were, by canal, 17.06 ; by rail, 34 ; coastwise, 9-10. The Boston percentage of the whole was 14.4.

The proportions of grain received at New York during seven months, from April 1 to October 31, 1886, were, by rail, 29,058,708 bushels ; by water, 36,919,555 bushels ; and for the same period in 1887, by rail, 27,721,262 bushels ; by water, 37,772,000 bushels. The controlling force and importance in amount of the competition by water are too obvious to require comment.

When the Erie canal was first constructed, opening up a continuous water-way from the West to New York, its great importance and prospective effect upon transportation to that city were clearly foreseen by the sagacious business men of Boston, and the project was contemplated for a considerable time of building a connection with the Erie canal to Boston. One plan was considered of building a canal over the Berkshire Mountains ; another plan was to tunnel the Hoosac Mountain for a canal where the railroad tunnel has since been made. But these projects were abandoned as impracticable, and the advantages of cheap and direct water transportation to Boston have not been secured. The influence of that mode of competition does not directly affect the Boston traffic by rail, but may indirectly benefit Boston in the general low rates to seaboard cities made necessary by the canal competition. This absence of direct water competition

at Boston, and the existence of it at New York are physical facts constituting inequalities which the carriers by rail are not required to make good to the less favored locality at their own expense.

The fact that the Boston export rates and the coastwise rates east of Portland and the west-bound rates from Boston have been equalized with the New York rates is not controlling nor even important upon the question of the reasonableness of the Boston local rates.

The character of the east-bound and west-bound traffic differs so materially that there is much force in the argument that the west-bound traffic can be carried at lower rates without serious disproportion in the aggregate earnings for the carriage of the same number of tons in the two directions. The testimony shows that over 70 per cent. of the east-bound traffic consists of the two lower classes of merchandise upon which the lowest rates are made, viz., 35 cents and 30 cents, respectively, per hundred weight. About half of the west-bound traffic from Boston and New England points is of the first, second, and third classes, upon which the rates are, respectively, 75 cents, 65 cents, and 50 cents per hundred weight to Chicago, and on that basis to other western points. During the year 1887, until October 1, 35 per cent. of the traffic carried west by the Boston and Albany road was of the first-class.

The export, coast-wise, and west-bound rates have long been conceded to Boston, by the carriers competing for east-bound business, not because the conditions of transportation are equal, but, under the demands of the laws of trade, to put Boston on an equality with competitors at Baltimore, Philadelphia, New York, Montreal, and Portland in reaching common markets abroad and at the west. That Boston has been very largely benefited by the concession of equality with New York in these respects cannot be doubted. The large export and import business and the heavy shipments to the west of imported merchandise from Boston and of manufactures of various kinds from different points in New England along the line of the Boston and Albany road and its connections show the great advantages to Boston of these liberal arrangements.

But like concessions were not made to the Boston local rates from the west. The merchandise shipped to Boston at the higher rates is for local consumption. There is no competition in that business from other localities. It is enjoyed exclusively by the Boston merchants and traders, and there is no reason to believe that the consumption would be larger or the prices to consumers materially less if the rates were on a par with those to New York. It was said in argument, and some testimony was given to support it, that the sales by Boston merchants to certain points north of Boston on the Massachusetts coast had fallen off to a considerable extent since the Act to Regulate Commerce took effect, and that grain from New York is carried to those points by water and sold at less than the Boston dealer can afford after paying local rates from Boston to those localities.

This is the only evidence in the case tending to show that Boston is in any way injured by the existing rates; and as there was opposing evidence that the shipments of flour and wheat to Boston from the first of April to the last of October, 1887, was in excess of the like shipments during the corresponding months in 1886, the inference that the falling off in shipments of corn and oats is due to the rates is scarcely warranted, and a doubtful inference, without evidence of a more positive character, is not sufficient to justify a finding of prejudice to Boston in comparison with New York justly attributable to the rates. This testimony, therefore, does not establish the unreasonableness of the rates to Boston.

The refusal of the Boston and Maine railroad to join in shipments from Boston to those places on the basis of the Boston rate makes necessary an additional local charge over that road, and the grain carried to those towns by water from New York is presumably grain borne at low rates over the Erie canal, for which the rail carriers are in no way responsible.

The average earnings of the line of the defendant carriers per ton per mile from Chicago to Boston for merchandise of the sixth class, at the Boston local rate of 30 cents per hundred weight, is 5½ mills. This is as low as the rate of any other rail carrier between the same points and as low as has

ever been charged in the absence of rate wars. The average per ton per mile earnings of the line of the Lake Shore and New York Central roads for the same class of merchandise from Chicago to New York at the rate of 25 cents per hundred weight is 5 48-1000 mills, being the difference of about 6-10 of a mill. In view of the difference in the circumstances and conditions of the traffic to the two cities, this discrepancy does not appear to be unreasonable or unjust.

The point is made that the differences in the New York and Boston rates are fixed sums—usually called arbitraries—of 10 cents per hundred weight for the first two classes, and 5 cents per hundred weight for the four other classes, and that these are not founded on an exact mathematical basis and do not change in amount if rates rise or fall. It is not perceived that there is any importance in this circumstance. The term “arbitrary” applied to rates in railroad phraseology implies no alarming significance. It is used to designate some rate not founded on a combination of other rates or upon a percentage theory of some general rate. It may be and frequently is lower than a rate established on a different basis. It is quite as likely, therefore, to indicate a favorable as an unfavorable rate. Mathematical precision in the adjustment of rates is not always attainable nor necessary, and if the differences are not in fact unreasonable it cannot be material whether they are arrived at by one mode or another, and while the custom of arbitraries or fixed differences may not be an ideal method it is simpler than fluctuating percentages, and so long as it is fair and equitable it is amenable to no valid objection. The differences between New York and other competing cities are also fixed sums or arbitraries; at Philadelphia and Montreal two cents per hundred weight lower on all classes, and at Baltimore three cents per hundred weight lower on all classes. The fact of a fixed difference in rates to the seaboard cities is not peculiar, therefore, to New York and Boston.

The existence of two depots for the Boston and Albany road at its eastern terminus, one for Boston local business and the other for export business at East Boston, with a haul six miles longer than to the local depot, is not entitled

to prominence upon the questions under consideration. Both are for the same road and for the same city, and for the better accommodation of the business for which they are designed, like the three or four depots of the New York Central road at New York city, some of which are nearly as far apart as those at Boston. As the East Boston depot is reached by a branch from the main stem of the road, it may be regarded in some respects as a different line; or, in view of the haul from Chicago and the circumstances of the case, it may with reason fall under the maxim "*de minimis non curat lex*."

The existing rates from Chicago and other western points to the seaboard cities have not been established capriciously nor reached by gentle and harmonious methods. They are the result of many years of contention and struggle, involving ruinous rate wars between the different lines, and repeated and protracted negotiations, in which concessions were necessary to arrive at an adjustment, finally culminating in the creation of a board or tribunal in which all the lines were represented for the settlement of disputes and the maintenance of peace and stability. The history of these contentions and their effects upon the roads and upon business is one of the most interesting chapters in the record of railroad development in this country. Beginning with eager rivalry and each line making rates independently and always with the view of securing the largest possible amount of business for itself, the differences to Baltimore and Philadelphia against New York were so great that wars were inevitable, and after most serious losses had been sustained and transportation demoralized, self-preservation, as well as the general public interests, required that destructive hostilities should cease and agreements be brought about on some basis of common justice and comparative equity. After several unsuccessful experiments the present basis of rates to the seaboard cities was established.

While by these adjustments the rate from Chicago to New York forms the basis with relation to which the whole system is arranged, that rate is in fact the one accepted by the shortest line, which is the line by the Pennsylvania road and

its connections, and the other lines must conform to it in order to share in the business. It thus results that all the lines to New York carry at the same rates; and by an extension of the same principle all lines to Boston carry at the same Boston rates. The seaboard rates are, therefore, all parts of a large and complicated system, and their relations and inter-relations are such that any material change in one rate involves numerous other changes. It was stated in the testimony that a reduction of the east-bound Boston local rate to the level of the New York tariff would require corresponding changes at several thousand other points in New England and at the west, and that the New England towns not on the direct line of the Boston and Albany road, but reached by its connections and now sharing the Boston rates, might lose their present advantages. The necessity for other changes in respect to related rates is not in itself an adequate reason for declining to correct any specific rate if it is in fact wrong, but when other changes would follow which might be injurious to other localities they are proper to be considered with reference to the general effect that might be produced by the proposed change, especially when a reasonable doubt of its propriety exists.

In 1882, when substantially the present differences in rates to the several Atlantic ports were in force and shortly after a fierce war had existed, a disinterested commission of three gentlemen was chosen by the different roads to consider and arbitrate the differential rates to the principal seaboard points. After taking much testimony and giving ample consideration to the subject the commission made an elaborate report, discussing at length the different principles urged as foundations for the differentials, viz., distance or mileage, cost of service, and competition, concluding that competition must be regarded as the only practicable principle on which the differences could be fairly adjusted, and that no reason appeared for changing the differences then existing.

It is proper to say that Boston was not represented upon the hearings before that commission, and the Boston differentials were not, therefore, directly involved, although the principles discussed applied equally to Boston with the other points.

The preceding discussion has been chiefly limited to the relation of the carriers to the transportation in question. The complaint is against the carriers and they only have appeared. The business interests of New York have not been heard; but a question of this nature has broader aspects than the interests and duties of the railroad carriers. The business interests of the city of New York are entitled to fair consideration and those interests should not be disregarded in passing upon transportation questions in which that city has large concern.

The geographical situation of New York, its unrivalled harbor, with many miles of available water front and wharves, its vast concentration and variety of business, its greatly superior ocean service, its location as the terminus of water transportation from the west and of many great competing railroad lines, its capacity for storage and its terminal facilities, its acknowledged commercial pre-eminence give undoubted advantages to that city, partly natural and partly the result of enterprise and State expenditure, to which it is justly and equitably entitled and which it would be an indefensible wrong to attempt to take away or neutralize.

No invidious comparison with any other city is intended, but undeniable facts cannot be ignored when a question of rights between competing localities is under consideration.

In view of the relative situation, competing transportation facilities, and natural and commercial advantages of the two cities it would seem unnatural and repugnant to equity that the carriers delivering property to them, respectively, should be compelled to make to both an equality of rates.

The conclusion of the Commission is that the petitioners have not, upon any legitimate grounds of rate-making, maintained their application for equality of rates with New York for east-bound local shipments to Boston, and that the existing rates, of which complaint is made, have not been shown to be unjust or unreasonable in themselves or relatively, and the petitioners have not shown unjust discrimination against Boston and in favor of New York by reason of those rates.

The several complaints must, therefore, be dismissed.

WALKER and MORRISON, *Commissioners*:

Agreeing in general with the foregoing opinion and concurring in the result, we are unwilling to be considered as assenting to the views above expressed in respect to the use of an "arbitrary" in fixing the Boston rate.

It appears from the agreed statement of facts that "the extra charge of 10 cents per hundred pounds in the case of the first two classes, and of 5 cents per hundred in the other classes of merchandise for transportation from Chicago to Boston over the charges for the transportation of the same merchandise from Chicago to New York is an extra fixed charge or 'arbitrary' which has for many years been added to the New York rate in fixing the Boston rate without reference to what the rate to New York might be; so that, for illustration, when in past times the through rate for the transportation of flour and grain from Chicago to New York was 50 cents, and again, when it was only 15 cents, the through rate to Boston for the same class of goods at the same time was in each case just 5 cents more—*i. e.*, 55 cents and 20 cents, respectively."

An arbitrary of 5 cents per hundred is 10 per cent. of a 50-cent rate and 20 per cent. of a 25-cent rate. The same proof which might show that this arbitrary was just when the New York sixth-class rate was 50 cents would demonstrate that it is unjust now. No facts have been shown which would justify a doubled disparity at one time as compared with another.

It further appears that the Chicago arbitraries of 10 cents on the two upper classes and 5 cents upon the remainder are enforced on business consigned to Boston from all points west of Buffalo, while at Buffalo the amount of the addition is summarily reduced one-half.

The propriety of somewhat higher rates from the west to Boston than to New York cannot properly be questioned, but the method pursued by the carriers in ascertaining the amount of difference is crude and unsatisfactory. The result is well named an "arbitrary."

The difference originally established seems to have been, at the time, an advance of about 10 per cent. in the rates to

Boston over the rates to New York, both from Chicago and from Buffalo. The facts fairly warranted a difference represented by that relative proportion, and it is hard to find substantial reasons for any greater distinction than that. No subsequent events have occurred which are claimed to have changed the situation to the prejudice of Boston. The proofs, however, fail to show the precise class rates which were in force at the time when the arbitrary was adopted.

An attempt was then made to ascertain a just measure of disparity from natural or other causes, and to apply the same to rates which were expected to fluctuate in the future. A percentage basis would have been and would now be a much more satisfactory and trustworthy method than the one which was adopted. Such a basis is easy of calculation; it could be applied without difficulty and with apparent justice at Chicago and all other trunk-line western points, from which the rate to New York is now a stated percentage of the rate from Chicago to New York; and it would in great measure efface the elements of injustice which the complainants perceive in the workings of the present system.

**JAMES PYLE & SONS, v. THE EAST TENNESSEE,
VIRGINIA AND GEORGIA RAILROAD COMPANY.**

Heard December 8, 1887. Decided February 15, 1888.

I. By the classification of the Southern Railway and Steamship Association adopted by the East Tennessee, Virginia & Georgia Railway Company on shipments of Pearline and common soap from New York to Atlanta, Ga., Pearline is in fourth-class freight with a rate of 73 cents per hundred pounds, while common soap is in sixth-class freight with a class rate of 49 cents per hundred pounds, but a "special rate" is given common soap of thirty-three cents per hundred pounds.

Held 1. That Pearline being competitive with common soap, the relative difference between the class rate of Pearline, and this "special rate" on common soap is too great, and that Pearline must be placed in fifth-class freight on shipments from New York to Atlanta by the defendant company, with a rate of sixty cents per hundred pounds, and also in the fifth class in the classification of the Southern Railway and Steamship Association, and, further, that the relative difference in the rates on Pearline and common soap in such shipments must not exceed the difference of sixty cents per hundred pounds on Pearline and thirty-three cents on soap.

2. Held further, that on shipments of Pearline and common soap, all rail, in the territory to which the classifications of the Southern Railway and Steamship Association applies, the following rates of this Association must be maintained by the defendant company, namely :

PER 100 POUNDS.	SOAP POWDER.	COMMON SOAP.
100 miles.	33 cents.	20 cents.
500 "	49 "	38 "

3. Held, that the discrimination made by the "special rate" of the Southern Railway and Steamship Association between Pearline and common soap, to the extent now existing on the shipments to which it refers, is unjust and must be discontinued, and while common soap is in its sixth class, Pearline must be placed in its fifth class.

II. A statement of the grounds of differences in the classification of articles of freight by railroad companies and a discussion of these, by which the conclusions of the Commission are reached, in the classification of Pearline when transported all rail on the one hand, or on the other, partly by water and partly by rail, as compared with the transportation of common soap by either mode.

W. Edgar Rogers and *Fred E. Tasker*, counsel for petitioners.

William M. Baxter, Esq., counsel for defendant.

REPORT AND OPINION OF THE INTERSTATE COMMERCE COMMISSION.

BRAGG, *Commissioner* :

The complaint in this proceeding involves the justice and reasonableness of the freight rate classification made by the East Tennessee, Virginia and Georgia Railway Company upon a certain powder manufactured by the plaintiffs, commonly known as "Pearline."

It is claimed in the complaint that this article is ruled to come under the head of "powders and washing compounds, etc.," in the classification of freight of this railway company to all points and cities from which the classification of freight as made the Southern Railway and Steamship Association is held to apply, and that it is rated by this company as "soap powder" in the classification of freight to all other points reached by the line of that railway, but which are not situated within the territory in which the classification of the Southern Railway and Steamship Association is held to apply. An example stated in the complaint is, to Knoxville, Tenn., Atlanta, Ga., Chattanooga, Tenn., as being points to which the Southern Railway and Steamship Association's classifications apply; and to transmit to Mississippi, points such as Shreveport, La., Dallas, Texas, Little Rock, Ark., to which the rate classification of the Southern Railway and Steamship Association does not apply.

The complaint alleges that by putting this article under the rating "powders and washing compounds, etc.," this company thereby charges a freight rate of over 100 per cent. (exact, 121.31 per cent.) more than it charges for a similar article, so far as freight purposes are concerned, namely, common soap, to the points above named. To Knoxville, Tenn., Atlanta, Ga., and Chattanooga, Tenn., the averment of the complaint is that the rate is 73 cents per hundred pounds, while that on common soap is 33 cents per hundred pounds. The complaint claims that this article should be granted the same freight rate as common soap upon the following stated grounds, namely: "It is not an article of different character, only differing in being in powder form. It is of similar bulk, packed in boxes similar to soap. It is no more liable to dam-

age or injury and no more trouble to handle or forward. It is used for the very same purpose in the laundry and for house cleaning, not in connection with soap, but in place of soap, and so competitive with soap; that, being competitive with common soap, it must be and is sold at a price that will admit of its use, and soap powders approximate very closely in the average price to that of common soaps of the same character. The same freight rate as that given common soap is granted our goods—(*i. e.*, Pearline) by every railroad and their connections, so far as we have any knowledge, and our knowledge extends to every part of our country, excepting only those that adhere to the tariff of the Southern Railway and Steamship Association in their own prescribed territory. The East Tennessee, Virginia and Georgia railway itself and others freely grant us the same freight rate as common soap to all points outside of the territory put under the classification of the Southern Railway and Steamship Association—for instance, under the head of soap, to the points named above, namely, Shreveport, La., Dallas, Texas, Little Rock, Ark., and Fort Smith, Ark.” The complaint claims that this is an unjust and undue discrimination, under the guise of a different classification, and forbidden by the Act to Regulate Commerce.

The answer of the defendant railway company to this complaint states that common soap is classed by it as sixth class, and is worth on an average about 5 cents a pound. It avers that “soap powders and washing compounds,” which cover plaintiffs’ article, are classed as fourth class in the tariffs of the East Tennessee, Virginia and Georgia Railway Company, and that in value petitioners’ article is worth from 13 to 15 cents per pound. It denies that the rates charged upon Pearline are unreasonable or unjust or that there is any unjust discrimination involved in them. It avers that there are many good and sufficient reasons, which will be shown by the evidence on the hearing, that justifies the rates charged, and it denies all the other allegations in the complaint.

From the evidence before us we find the material facts in this proceeding to be as hereinafter stated. Pearline is a cleansing compound used for the same purposes as common

soap. The leading products that are used in its manufacture are cotton-seed oil or other oils or fatty matter, soda caustic, and soda alkali. As prepared for use, it is a powder. Pearl-ine is packed in small paper boxes made by machinery, with open ends, and these packages are then packed in a wooden box, in which manner it is transported by railroads. From 8 to 10 cents is the wholesale price at which it is sold in the different parts of the country. The retail price is 5 cents a package, which contains 5 or 6 ounces. It is the highest-priced soap powder sold, and is in very general use. There are from 20 to 30 kinds of soap powers manufactured in the United States. Pearline is competitive with common soap and is used for much the same purposes.

The wholesale price of common soap in the different parts of the country is from 3 to 5 cents per pound. In case of an accident in being transported common soap would have certain advantages over Pearline. Not being in powder form, it would not be scattered by the crash of a collision, nor would its value be so much impaired by becoming wet in the event of such accident. If common soap should become wet by a railroad accident this would injure it but little. If Pearline should become wet by a railroad accident this would, to a greater or less extent, impair its value, and might destroy its value altogether. It would also be greatly injured by becoming damp from any case. Common soap is also transported in wooden boxes.

By the classification of the Southern Railway and Steamship Association Pearline is classified in the fourth class, and by the same classification common soap is classed as sixth class. According to this classification, the class rate from New York to Atlanta would be 73 cents per one hundred pounds on Pearline and 49 cents per one hundred pounds on common soap. There is a special rate on common soap to Atlanta of 33 cents from New York, made up as follows, namely: The schooner rate from New York to Savannah and the rate of the Georgia Railroad Commission from Savannah to Atlanta. This special rate applies to certain other points within the territory covered by the rates of the Southern Railway and Steamship Association besides Atlanta. The

rate on soap powders and Pearline from New York to Atlanta, Ga., is 73 cents per hundred pounds, and is made up as follows: The schooner rate from New York to Savannah, to which is added the rate fixed by the Georgia Railroad Commission from Savannah to Atlanta. The all-rail rate from New York to Atlanta, by way, in part, of the East Tennessee, Virginia and Georgia Railway, is also 73 cents per hundred pounds on soap powders and Pearline, and is made to meet the water and rail class rate by way of Savannah.

The railroad commissions of Georgia and Alabama each places Pearline in the fourth class and common soap in the sixth class, as fixed by the Southern Railway and Steamship Association.

During the last five or six years the subject of the relative rates on Pearline and soap powders on the one hand and common soap on the other has frequently been before the rate committee of the Southern Railway and Steamship Association, and on account of the greater liability of soap powders and Pearline to injury and destruction as compared with common soap in case of accident, as well as on account of their greater pecuniary value over common soap, this rate committee has uniformly adhered to placing Pearline in their fourth class and soap in their sixth class. By the classification of the Southern Railway and Steamship Association castile and fancy soap are second class.

The East Tennessee, Virginia and Georgia Railway Company proper extends from Briston, Tenn., to Brunswick, Ga. Through purchased and leased lines it also extends to Meridian, Miss., and to Memphis, Tenn. The trunk line classification applies to Memphis, Tenn., and Little Rock, Ark.; the Texas classification applies to Dallas, Texas, and Shreveport, La.; but no rates appear to have been issued under the Texas classification for Fort Smith, Ark., nor do shipments to that point seem to be covered by the trunk line classification, and they are doubtless made up by a combination of the trunk line classification and a local state classification from Little Rock to Fort Smith.

A comparison of the various rates and classifications fixed upon Pearline and common soap by the trunk line classifica-

tion, the Texas classification, and the Southern Railway and Steamship Association's classification is alleged in the complaint and attempted to be made in the evidence of the witnesses examined before us ; but there were and are so many difficulties inherent, arising from the difference in classes in these several classifications, that this attempt was productive of no very satisfactory results. Each side relied upon these classifications and rates to sustain them in the positions they assumed, knowing, as they did, that these classifications and rates are on file before us, and are matters that we would examine ourselves to the extent they could properly be considered as evidence. We have examined these various classifications on file with us, so far as they pertain to the subject of this controversy, for the purposes of comparison, and as bearing upon the merits of this controversy.

By the trunk line classification soap powder and common soap are each embraced in the fourth class. The rates on these articles from New York are as follows :

SOAP POWDER AND COMMON SOAP PER 100 POUNDS.

	L. O. L.	O. L.
To Memphis via Louisville.....	50 cents.	44 cents.
Little Rock via St. Louis.....	75 "	60 "
Fort Smith " "	90 "	79 "

The rates on soap powder and articles of the same class under the Trunk Line Association's classification are as follows per 100 pounds :

	L. O. L.	O. L.
For 100 miles.....	16 cents.	15 cents.
500 "	25 "	21 "
600 "	27 "	23 "

The rates and classification *via* the Sunset route (Southern Pacific) are as follows :

From New York to Little Rock, to which the trunk line classification applies, the same as that classification, viz., per 100 pounds—

Common soap and soap powder, rate L. C. L.....	60 cents.
" C. L.....	45 "

To Dallas, Tex., and Shreveport, La., the Texas classification applies, viz., by which Pearline, common soap, and soap powder are shown to be in the same class, viz: L. C. L., 4th, C. L. A., and the rates from New York are per 100 ponnds:

To Shreveport, L. C. L.....	70 cents.
“ C. L.....	64 “
Dallas, L. C. L.....	102 “
“ C. L.....	98 “

The rates for distances of 100 and 500 miles in the territory to which the Texas classification applies are for common soap and Pearline per 100 pounds:

100 miles, L. C. L.....	47 cents.
“ C. L.....	46 “
500 “ L. C. L.....	69 “
“ C. L.....	62 “

The rates for distances of 100 miles and 500 miles, in the territory to which the Southern Railway and Steamship Association’s classification applies, in any quantity, are as follows:

	SOAP POWDER.	COMMON SOAP.
100 miles.....	32 cents.	20 cents.
500 “	49 “	38 “

A computation of the number of articles and number of classifications of articles as found in the different classes, and then the number of classes in each of the different systems, shows the following results:

CLASSIFICATION.	NUMBER OF ARTICLES.	NUMBER OF CLASSIFICATIONS.	NUMBER OF CLASSES.
Trunk Line.....	1,614	4,354	6
So. R’y & S. S. Ass’n.....	874	1,602	13
Texas.....	891	1,591	9

The methods by which the results stated in the table last above mentioned is arrived at is as follows: By counting the different articles mentioned and then to count the different classifications of such articles; for example, acids are classed in nine different ways, according to how shipped. In the count of articles acid is counted as one article, and in the number of classifications as nine.

No complaint has ever been made by any other manufacturer of soap powders and washing compounds against the classification or rates of the Southern Railway and Steamship Association, as the evidence adduced on the part of the railway company in this case shows, except the manufacturers of Pearline, and this has been true for the last thirteen years. No evidence was offered of any instance in which any company which has adopted the classifications and rates of the Southern Railway and Steamship Association has ever sustained any loss on account of Pearline or soap powders by accident collision, or otherwise.

Upon this state of facts we perform the duty of stating our conclusions.

The method of classification, which consists of grouping a large number of articles into each of several different classes with different rates for the transportation of each class, has long existed in the operation of railroads. In making up a class by this method articles of the same kind are usually grouped together in the same class as far as this can be done; but as the articles in each class are so very numerous there is a very great diversity of such articles, and it results that there are generally but few things of the same kind that can be placed in one class. This is unavoidable, because the articles are so numerous while the classes are but few. All articles embraced in a class are usually charged the rate of that class, whatever it may be. To carrier and shipper alike it indicates the amount of the rate charged.

One of the many embarrassments connected with the transportation of freight by railroads consists in the fact that there is such a lack of uniformity in the classifications of freight found in the different portions of the country. The three associations mentioned in evidence in this case are not all that there are of this description in the United States; yet each of them has different classifications, and, having different classifications, in this way charge different rates for what in many cases is a substantially similar service. The Trunk Line Association, for instance, with 1,614 articles and 4,354 classifications, has all these grouped into six different classes. The Texas Association, with 891 different articles,

classified under 1,591 different names, has all these grouped into nine different classes. The Southern Railway and Steamship Association, with 874 articles and 1,602 classifications of these articles, has them all grouped into thirteen different classes.

This mode of making rate by classification is intended to be for the convenience of the railway company and also for the accommodation of the shippers, and long experience has shown that it is the best and most practical way yet devised for dealing with the subject. To demonstrate that there are occasional inequalities of rate upon some of the articles thus grouped together in one class as compared with others in that class is not to prove that the whole system is wrong, but simply that there is or may be some slight or occasional difference in the rates charged upon some one article in proportion to its value, bulk, or weight, when compared with another, that inflicts no substantial wrong upon any one, and is one of the mere incidents of the service by this method of transportation. To show that some one article of freight in a class is charged a much higher or lower relative rate than it ought to be charged when compared with another in that or some other class may, under all the circumstances, establish the result that a mistake has been made in its classification that amounts to an unjust discrimination.

In grouping articles together in a class for the purpose of fixing rates upon these articles several considerations are usually deemed by the carrier of a very controlling nature. Among these may be mentioned bulk and space occupied, value, hazardous and extra hazardous freight, liability to waste or injury in transit, weight, or the like. Upon such articles as dynamite, nitro-glycerine, gunpowder, and all other explosives a higher rate is charged than upon other articles of similar value, weight, and size that are not explosives, on account of the risk connected with their transportation, arising particularly in the event of serious accident. In one case there is little, if any, risk to the carrier that the article transported will be destroyed in case of accident, or that, being destroyed itself, it will also contribute to the destruction of other freight; while in the other case there is

very great risk ; in case of serious accident, explosives will not only be destroyed, but will contribute to the destruction of other larger quantities of freight. This is one illustration. Another is that freight which occupies a great deal of space must to some extent be charged for that space ; or, if it be freight of very great value, it is deemed that a higher rate may be charged upon it than if it be freight of very little value, on account of the responsibility connected with the service performed and the corresponding benefit conferred to the owner of the freight by its transportation ; or, if it be freight that is liable to waste or injury in transit, then a higher rate may be charged for its transportation than upon an article of similar value not liable to any waste or injury in transit in consequence of the risk, care, and responsibility assumed by the carrier.

As the freight rates of a railroad are laid for the purpose of obtaining revenue from its operation, it is but just and fair that they should be so distributed upon the different articles transported, as far as this can be done, so as to bear upon all with relative equality. This being true, the considerations to which we have referred as influencing carriers in making these rates are just in themselves, although their application to different articles of freight is frequently difficult and must unavoidably require the exercise of great care to avoid occasional unjust discrimination.

It is upon these general principles that defendant in this case justifies the difference in the classification and corresponding rate made between common soap and "soap powder" or "Pearline." Its defense is that because of the greater value of Pearline over common soap and the greater liability of Pearline to damage in case of accident, that, therefore, it is justified in making this difference in the rate. We are satisfied from the evidence that in case of serious accident while being transported, as by collision of cars or by exposure to rain or water consequent upon such collision, that in either event Pearline, being a soap powder, would be subject to much greater damage and injury than common soap. If there was a serious collision it would be scattered into a mass of powder, and then if it should become wet it

would be ruined, or if from any cause it should become damp it would be greatly injured. This would not be the case with common soap. It is very true that the evidence shows no instance where this company or any other company has sustained any loss arising from accident in the transportation of Pearline; but this does not prove that there is not such greater risk in the transportation of Pearline over common soap in case of a serious accident. We say serious accident because it is not every accident that would necessarily, or even probably, cause this injury or damage to Pearline. A considerable percentage of accidents might occur to a train without injuring Pearline more than soap; but serious accident to the car in which Pearline and soap were being transported, resulting in the crushing of the car and of the articles in the car, would probably result in much damage to Pearline without inflicting any such corresponding injury on common soap. Such serious accidents are of course not common occurrences, but nevertheless they do sometimes happen and are liable to occur. We think, from the character of the two articles, which were exhibited in evidence before us and also from other evidence, that there would be much greater risk in the event of serious accident resulting from the transportation of Pearline than common soap.

We find from the evidence that Pearline is about twice the market price of common soap, and this is a circumstance deserving of consideration. The very great difference in the value and also the risk in case of serious accident in the transportation of Pearline, as compared with common soap, would seem to indicate that there is ground for a reasonable difference between the freight rates on these two articles. Whether the difference made between them in the classifications and freight rates of the Southern Railway and Steamship Association is altogether reasonable is another question. We do not find that the evidence justifies the full difference made between them by the special rate of the Southern Railway and Steamship Association, although it does in large part. Pearline is shown by the evidence to be an article that is competitive with common soap, and is used for the same purposes, and care should therefore be exercised not to

make the rate upon it practically prohibitory or greatly onerous. The evidence shows it to be an article of general use. It seems to us that a reasonable rate for Pearline would be to place it in the fifth class of the Southern Railway and Steamship Association, by which it would have to pay a rate of 60 cents per hundred pounds from New York to Atlanta, instead of 73 cents, as it is now required to do by being in the fourth class. This, it appears to us, under all the circumstances, would be more relatively just and reasonable. After all, a classification is but a means of arriving at a rate. The statute requires the rate to be reasonable, taking fairly into consideration every circumstance, condition and service performed in its transportation and relatively with other rates. The mere method of arriving at what is a reasonable rate is a matter of far less consequence than that the rate itself should be reasonable and relatively just.

We have carefully considered the classifications and rates of the other associations in evidence for the purpose of comparison. The trunk line classification makes no difference whatever between soap powder and common soap, and this is true of the Texas classification, the classification of the Sunset route and the western classification. But while this is deserving of much consideration, and such it has received at our hands, yet it does not satisfy us, upon the grounds above stated, as shown in the evidence in this case, that there is not such a difference between the two that warrants the rate we have named. We have had occasion to observe heretofore, and again repeat, that the conditions of transportation are in some respects very different in different parts of the country. According to the evidence this freight reaching Atlanta from the seaboard is transported from New York by far the greater portion of the distance by sea, and while this is to that extent a cheaper route from New York to Savannah, or from New York to Charleston, yet the liability of a powder like Pearline to injury on that part of the route from exposure to water or damp in case of accident might well be greater than if the transportation was by all rail. Besides, there is more of extra handling and additional risk from that cause. To cover that kind of transportation

the classification and freight rates of the Southern Railway and Steamship Association from New York to Savannah are largely made. We are obliged to know, and do know, that most of the freight from New York transported over the East Tennessee, Virginia and Georgia railway comes by way of the ocean to Norfolk, and is taken from there south and west by rail; so that as to this the same considerations could well apply which we have named in the case of the Southern Railway and Steamship Association. This is true also, of transportation from New York by the Sunset or Southern Pacific route, which is by sea to New Orleans. In the transportation covered by these classifications there is as to a powder, like Pearline, united in greater degree the risks incident to collision, water and dampness, and extra handling than if the transportation was all rail. On the other hand, the transportation of the trunk lines proper is all rail. The transportation of the Western Association is also all rail. These involve different conditions of transportation, and when comparison is attempted to be made of these respective classifications and rates these different conditions cannot be ignored. By the trunk line classification the rate is lower on soap and Pearline than it is by the classification of the Southern Railway and Steamship Association, while the rate by the Texas classification is considerably higher than either. These results are defined and explained by the defendant as arising upon the different circumstances under which the service is rendered, being in the case of the trunk lines through a much more populous territory and having a greater volume of freight as accounting for their cheaper rates, and through a more sparsely settled country and having less volume of business, in the case of the Southern Railway and Steamship Association and the Texas classification, as accounting for their higher rates. Without now going into an extended examination of these differences of conditions as they exist in the case of these different associations, which is unnecessary, in the view we take of the case, we recognize that there is quite a sufficient difference in their conditions to make any attempted comparison between their rates of very little value in this particular case upon the

grounds we have named. If the transportation from New York to Atlanta was all rail, then we should say that the relative difference between the rate on Pearline and common soap ought not to be more than about 50 per cent., as we have above shown in the case by the classifications of the Southern Railway and Steamship Association on distances of from 1 to 500 miles, which evidently refers to shipments by all rail, but the extra risks and handling to Pearline of its coming a great portion of the way by sea may, we think, justify the increased relative difference in rate.

The defendant relies upon the fact that it has been sustained in its classifications as to Pearline and common soap by the honorable railroad commissions of Georgia and Alabama. We have given a very high and respectful consideration to the action of these honorable and respected tribunals when offered in evidence before us ; but, as in the case of Reed and Evans against the Oregon Railway and Navigation Company, in manuscript, where a recommendation of the honorable railroad commission of Oregon was relied upon by the petitioners as sustaining their view of the case, we said that we did not know what was the evidence before that tribunal which induced it to arrive at the result it did, and were constrained to be governed by the evidence before us, under the statute, in a matter relating to Interstate Commerce. So also we have to be influenced by the same considerations in the case now before us ; besides, we feel satisfied from the evidence before us that the difference between this "special rate" and the class rates was not before either of those tribunals. At least, the evidence does not show that it was.

The defendant is not responsible for the rates made at Shreveport, Little Rock, and Fort Smith ; for, as we have already shown, each of these points is beyond its terminus, and the rates made there are made by the Trunk Line Association, the Texas Association, and the Western Association.

The order of the Commission is that the defendant must cease to charge a rate of 73 cents per hundred pounds on Pearline from New York to Atlanta, and that said rate must not exceed 60 cents per hundred pounds for said service, and

that the difference in the rate upon Pearline and common soap must not exceed the difference between the relative amounts of 60 cents per hundred pounds for Pearline and 33 cents per hundred pounds for common soap when transported over its line, coming from New York and going to Atlanta. As to these articles when transported over its line as and between other points involving interstate traffic, and at points where the classifications of the Southern Railway and Steamship Association apply, the relative differences between the rates upon them as above stated for distances of from 100 to 500 miles by the classification of the Southern Railway and Steamship Association, all rail, must be maintained, namely, per 100 pounds :

	SOAP POWDER.	COMMON SOAP.
100 miles.....	82 cents.	20 cents.
500 "	49 "	38 "

The discrimination made by the "special rate" of the Southern Railway and Steamship Association between Pearline and common soap to the extent herein indicated is unjust and must be discontinued ; and, while common soap is in its sixth class, Pearline must be placed in its fifth class.

**W. B. FARRAR & COMPANY, *Petitioners*, v. THE EAST
TENNESSEE, VIRGINIA & GEORGIA RAILWAY
COMPANY AND THE NORFOLK & WESTERN
RAILROAD COMPANY, *Defendants*.**

Heard January 11th, 1888—Decided February 15th, 1888.

- I. The local rates from Dalton to Knoxville, Johnson City and Bristol on lumber are not shown to be unreasonable.
- II. The joint rates on lumber from Dalton to Roanoke and Lynchburg are shown to be unreasonable upon the grounds and for the reasons set forth in the report and opinion of the Commission.
- III. As a rule in the transportation of freight by railroads while the aggregate charge is continually increasing the further the freight is carried, the rate per ton per mile is constantly growing less all the time, making the aggregate charge less in proportion every hundred miles after the first, arising out of the character and nature of the service performed, and the cost of the service; and thus staple commodities and merchandise are enabled to bear the charges of this mode of transportation from and to the most distant portions of the country.

The Act to Regulate Commerce so far from throwing hampering restrictions or obstacles in the way of the operation of this salutary rule, gives it all the benefit and aid of its sanction and safeguards by providing that the carrier shall be entitled to receive a reasonable compensation for the service performed upon open published rates, against which no competitor can take advantage by allowing shippers secret rebates and drawbacks in order to get the business.

- IV. In the nature of things joint rates on long hauls usually are, and as a rule should be, lower in proportion to distance than local rates on short hauls of the same commodity.

No counsel for petitioners.

W. M. Baxter, Esq., counsel for defendants.

REPORT AND OPINION OF THE INTERSTATE COMMERCE COMMISSION.

BRAGG, *Commissioner*:

The complaint in this proceeding is against the reasonableness and justice of the lumber rates of the East Tennessee, Virginia and Georgia Railway Company from Dalton, in the State of Georgia, to Knoxville, in the State of Tennessee, and from Dalton to Johnson City and Bristol, which last two named points are in the State of Tennessee, and from Dalton

to Roanoke and Lynchburg, which last two named points are in the State of Virginia.

The complaint avers that petitioners reside at Dalton and are largely interested in the lumber and building business, and have been for the past twenty years, and are obliged to use the East Tennessee, Virginia and Georgia railway and the Norfolk and Western railroad to market their products. The complaint states that the rates now charged by these railroads for transporting the lumber of petitioners from Dalton, to Knoxville, Bristol, Roanoke, and Lynchburg are as follows:

To Knoxville, 7 cents per 100 pounds.
To Bristol, 11 cents per 100 pounds.
To Roanoke, 22 cents per 100 pounds.
To Lynchburg, 22 cents per 100 pounds.

The complaint states, in effect, that prior to the enactment of the Act to Regulate Commerce, approved February 4, 1887, these rates were as follows from Dalton:

To Knoxville, 6 cents per 100 pounds.
To Johnson City, 11½ cents per 100 pounds.
To Bristol, 11 cents per 100 pounds.
To Roanoke, 18 cents per 100 pounds.
To Lynchburg, 18 cents per 100 pounds.

The complaint alleges that the rates now charged them on lumber, as above set forth, are unreasonable, excessive and unjust, and have the effect of driving them out of these markets and greatly injuring their business.

The answer of the East Tennessee, Virginia and Georgia Railway Company to the complaint states that prior to the passage of the Act to Regulate Commerce its rates were as follows:

From Dalton, Georgia, to Knoxville, Tenn., per 100 pounds, seven (7) cents local, six (6) special.

From Dalton, Ga., to Bristol, Tenn., per 100 pounds, eleven (11) cents local, ten (10) cents special.

From Dalton, Ga., to Roanoke, Va., per 100 pounds, twenty-two (22) cents.

From Dalton, Ga., to Lynchburg, Va., per 100 pounds, seventeen (17) cents.

That since the passage of the Act to Regulate Commerce its rates have been as follows :

From Dalton, Ga., to Knoxville, Tenn., per 100 pounds, seven (7) cents.

From Dalton, Ga., to Bristol, Tenn., per 100 pounds, eleven (11) cents.

From Dalton, Ga., to Roanoke, Va., per 100 pounds, twenty-two (22) cents.

From Dalton, Ga., to Lynchburg, Va., per 100 pounds, twenty-two (22) cents.

That both prior to the enactment of the Act to Regulate Commerce and since its enactment the rates from Dalton, Ga., to Roanoke and Lynchburg, Va., have been joint rates between the East Tennessee, Virginia and Georgia Railway Company and the Norfolk and Western Railroad Company; that the only changes the respondent has made in its rates since the enactment of the Act to Regulate Commerce have been that it has abolished the special rates that were given from Dalton, Ga., to Knoxville and Bristol, Tenn., and that so far as the joint rates between respondent and the Norfolk and Western railroad are concerned it has placed Lynchburg, Va., upon the same basis as Roanoke, Va., the rate now being 22 cents per hundred pounds on lumber to each of these points from Dalton, Ga.; that as the former joint rate from Dalton, Ga., to Lynchburg, Va., was in conflict with the provisions of the Act to Regulate Commerce, respondent, in obedience to the provisions of that law, together with the Norfolk and Western railroad, increased the rate from Dalton, Ga., to Lynchburg, Va., so that it should not be less than the rate from Dalton, Ga., to Roanoke, Va.; that prior to the enactment of the Act to Regulate Commerce the rate to Lynchburg, Va., was forced upon respondent and the Norfolk and Western railroad in order to allow its patrons to compete in the Lynchburg market with lumber coming from

other sections of Virginia and North Carolina; and the rate to Lynchburg from Dalton was made with a view of developing the lumber product along the line of respondent's railroad; that the Act to Regulate Commerce having made any such purpose unlawful, respondent, in obedience to the provisions of the statute, withdrew said rate of seventeen cents per hundred pounds on lumber from Dalton, Ga., to Lynchburg, Va.; that its own rates and the joint rates between the Norfolk and Western railroad and itself are reasonable and just, and that petitioners have no just ground for complaint; that none of its rates, either separate or joint, are larger for the shorter than for the longer distance over the same line, the shorter being included in the longer distance; and having made these statements, the respondent denies every other material allegation in petitioner's complaint which has not hereinbefore been admitted.

The answer of the Norfolk and Western Railroad Company states that the freight rates from Dalton, Ga., to points on and beyond the Norfolk and Western railroad are by the usage between connecting railroads, and especially by agreement between the East Tennessee, Virginia and Georgia railway and the Norfolk and Western railroad made, are quoted and applied by and under the authority of the East Tennessee, Virginia and Georgia Railway Company as the initial line at interest; that a due regard for the requirements of and a compliance with the Act to Regulate Commerce necessitated a revision of rates from that group of stations on the East Tennessee, Virginia and Georgia railway in the vicinity of Rome and Chattanooga, of which Dalton, Ga., is one, immediately after the law became operative, and in said revisions advances in various total rates to Virginia points became necessary, among which rates those on lumber were included; that the complainant's allegation that rates on lumber from points in North Carolina to Lynchburg or Roanoke are lower than from Dalton is in some cases true, but in such case the Norfolk and Western railroad is the acceptor and not the maker of the rates, which rates are in no case greater for the shorter than for the longer haul over the same line, in the same direction, because the business does not origi-

nate on its line, and it is a fact that the business coming from North Carolina points moves over the Norfolk and Western railroad in different directions from that coming from Dalton and under dissimilar conditions, and that the competition of markets to which your complainant objects is a commercial condition not within the province of the Norfolk and Western railroad to judge of or to remedy, being the delivering line at interest in the transportation, and concerning itself primarily in the matter of the rates employed by either of the initial lines at interest to see that, as the traffic is interstate business, conformity is had with the law, which it respectfully submits and hereby certifies to, is to its knowledge and belief, fully done.

Upon due notice thereof to the respective parties this case was set down to be heard by the Commission on the 11th day of January, 1888, at its office, in the city of Washington. On that day the defendant railroad companies appeared before the Commission by their counsel, William M. Baxter, Esq., of Knoxville, and Augustus Pope, Esq., general freight agent of the Norfolk and Western Railroad Company, but the petitioners failed to appear, either by themselves or counsel, while still insisting on their complaint.

The controversy being one relating to the reasonableness and justice of the rates charged upon a standard article of freight of general and necessary consumption in all parts of the country arising upon the face of the tariffs of the defendant railroad companies, after the examination of these it occurred to the Commission that, with the aid obtained from an informal conference with the counsel and general freight agent then present, this contention might at that time be disposed of without further delay and expense to the parties. Accordingly this informal conference was then had, and after hearing and considering all the statements, suggestions, and arguments of counsel and the general freight agent, the Commission suggested to them that in its opinion the rate upon lumber to Roanoke, Va., from Dalton, Ga., over the line of the East Tennessee, Virginia and Georgia railway and the Norfolk and Western railroad ought not to exceed eighteen cents per hundred pounds.

The Commission was then requested by the said counsel and general freight agent to suspend any further action and announcement in this matter for a period of two weeks, until T. S. Davant, general freight agent of the East Tennessee, Virginia and Georgia Railway Company, at Knoxville, Tenn., could prepare and furnish to the Commission a statement of facts and figures in opposition to the complaint. A month having elapsed without hearing from Mr. Davant, the Commission deems it proper to now dispose of this case without further delay.

The Commission finds the material facts involved in this controversy, from the petition and answers and the tariffs and joint contracts of said railroad companies on file with us, to be in substance as follows :

The East Tennessee, Virginia and Georgia Railway Company embraces in its system several valuable and important railroad lines in the States of Tennessee, Georgia, and Alabama, with its chief terminal points at Bristol, Tenn., Memphis, Tenn., Meridian, Miss., and Brunswick, Ga. Dalton, Ga.; Knoxville, Johnson City, and Bristol, each in Tennessee, are situated upon its line. Roanoke and Lynchburg, each in Virginia, are situated on the line of the Norfolk and Western railroad.

The present local tariff rates of the East Tennessee, Virginia and Georgia Railway Company in force on lumber from Dalton to Knoxville, a distance of 110 miles, are 7 cents per hundred pounds; from Dalton to Johnson City, 216 miles, are 10½ cents per hundred pounds, and from Dalton to Bristol, 241 miles, are 11 cents per hundred pounds. From Dalton to Roanoke, a distance of 391½ miles, the joint rates of the East Tennessee, Virginia and Georgia railway and the Norfolk and Western railroad are 22 cents per hundred pounds, and from Dalton to Lynchburg, 445 miles, the joint rates are 23 cents per hundred pounds.

Prior to the enactment of the Act to Regulate Commerce the rates of the East Tennessee, Virginia and Georgia Railway Company on lumber from Dalton to Knoxville were 7 cents local and 6 cents per hundred pounds special, and from Dalton to Bristol per hundred pounds were 10 cents special

and 11 cents local. The joint rates of the East Tennessee, Virginia and Georgia Railway Company and the Norfolk and Western Railroad Company on lumber from Dalton to Roanoke were 22 cents per hundred pounds, and from Dalton to Lynchburg were 17 cents per hundred pounds.

The changes made in the lumber rates of these two railroads since the enactment of the Act to Regulate Commerce consist in abolishing the above special rates and in increasing the rate from Dalton to Lynchburg from 17 cents to 22 cents per hundred pounds, in order that it might not be less for the greater distance, and thus violate the statute. The previous rate of 17 cents per hundred pounds on lumber from Dalton to Lynchburg had been given with a view of developing the lumber products along the line of the East Tennessee, Virginia and Georgia railway, and was also forced by the competition of lumber coming by other lines of railroad into the Lynchburg market from North Carolina and Virginia. Lynchburg and even Roanoke are nearer to the lumber-producing region of North Carolina than is Dalton.

The East Tennessee, Virginia and Georgia railway and the Norfolk and Western railroad are operated under joint contracts, dated September 27, 1881, and March 16, 1885, which are on file with us pursuant to law, and which provide for close running arrangements and joint rates over these lines. Under these the Norfolk and Western railroad does not make the rates on lumber from Dalton to Roanoke and Lynchburg, but these rates are made by the East Tennessee, Virginia and Georgia Railway Company, and the Norfolk and Western Railroad Company only accepts its share of the joint rate.

A careful examination and consideration of all the matters involved in this complaint have brought us to the conclusions hereinafter stated.

The rates now in force on lumber from Dalton to Knoxville, Johnson City, and Bristol by the East Tennessee, Virginia and Georgia Railroad Company are each rates not shown to be unreasonable. The joint rate on lumber from Dalton to Roanoke and Lynchburg is considerably out of line with the local rates of the East Tennessee, Virginia and Georgia Railway Company from Dalton to Knoxville, John-

son City and Bristol, in proportion, considering the length of the haul and the services rendered.

In a brief enumeration it stands thus :

Dalton to Knoxville,	110 miles, local rate,	7 cents per 100 pounds.
Dalton to Johnson City,	216 miles, local rate,	10½ cents per 100 pounds.
Dalton to Bristol,	241 miles, local rate,	11 cents per 100 pounds.
Dalton to Roanoke,	391½ miles, joint rate,	22 cents per 100 pounds.
Dalton to Lynchburg,	445 miles, joint rate,	22 cents per 100 pounds.

It is a very familiar rule in the transportation of freight by railroads and has become axiomatic, that while the aggregate charge is continually increasing the further the freight is carried, yet the rate per ton per mile is constantly growing less all the time, unless there be exceptional conditions modifying this rule. In consequence of the existence of this rule the increase of the aggregate charge continues to be less in proportion every hundred miles after the first, arising out of the character and nature of the service performed and the cost of service; and thus it is that staple commodities and merchandise are enabled to bear the charges of transportation from and to the most distant portions of our country. Examples showing the universality of this rule may be seen in the tariffs of railroad companies generally in the United States, where their length is sufficient to admit of its application. In the rates charged between Dalton, Knoxville, Johnson City and Bristol, this rule is observed, but between Bristol and Roanoke and Lynchburgh, in this continuous haul from Dalton, it is not. The Act to Regulate Commerce, so far from throwing hampering restrictions or obstacles in the way of the operation of this salutary rule, gives it all the benefit and aid of its sanction and safeguards by providing that the carrier shall be entitled to receive a reasonable compensation for the services performed, upon open published rates, against which no competitor can take advantage by allowing shippers secret rebates and drawbacks in order to get the business.

The rates, too, between Bristol and Roanoke and Lynchburg are joint rates, which, in the nature of things, are usually, and as a rule should be, lower in proportion than local rates on short hauls; but, in this instance, instead of

this being the case they are really greatly higher in proportion than the rates between Dalton and Bristol. There is no unloading of cars at Bristol and no re-handling of the freight there. The car loaded with lumber at Dalton, bound for Roanoke, passes Bristol without stoppage or change. Up to Bristol, a distance of 241 miles from Dalton, the charge upon its freight has been 11 cents per 100 pounds; from Bristol to Roanoke, a distance of 150½ miles, the charge upon this freight is 11 cents additional per 100 pounds; and to Lynchburg, a distance of 204 miles from Bristol, the charge upon this freight is the same as to Roanoke, thus completely reversing the rule which has been established as axiomatic by the experience of railroad transportation all the world over in the case of Roanoke and Lynchburg, but most glaringly in the instance of Roanoke. While the rate is joint, it is in substantial effect much the same as charging combined local rates. We inquired carefully of the general freight agent of the Norfolk and Western Railroad Company what reason, if any, there could be for this anomalous rate, and could learn of none that could sustain or justify it. A joint rate of 22 cents per 100 pounds upon lumber in car-load lots from Dalton, Ga., to Roanoke and Lynchburg, Va., is, of course, under the surroundings of this traffic, prohibitory in its nature.

It may be or it may not be that after petitioners are allowed reasonable rates on their lumber to Roanoke and Lynchburg, still lumber producers in North Carolina will have some advantages over them, arising from being nearer to Lynchburg and Roanoke. With all that, and however it may be, we have nothing to do. The petitioners are entitled to reasonable rates, nothing more and nothing less.

The conclusion that we have reached upon the evidence in this case is that the joint rates of 23 cents charged by the East Tennessee, Virginia and Georgia Railway Company and the Norfolk and Western Railroad Company upon car-load lots of lumber from Dalton, Ga., to Roanoke and Lynchburg, Va., are each unreasonable, and that 17 cents per 100 pounds on car-load lots of such lumber from Dalton to Roanoke and 18 cents per 100 pounds on car-load lots of such lumber from Dalton to Lynchburg would be reasonable.

The order of the Commission, therefore, is that within five days after the receipt of this order the defendant companies must cease to charge 22 cents per 100 pounds on car-load lots of lumber from Dalton to Roanoke, and in lieu thereof must charge not exceeding 17 cents per 100 pounds on such car-load lots of lumber; and that within five days after the receipt of this order the defendant companies must cease to charge 22 cents per 100 pounds on car-load lots of lumber from Dalton to Lynchburg, and in lieu thereof must charge not exceeding 18 cents per 100 pounds on such car-load lots of lumber.

After the decision of the case as above the petitioners raised the question whether they were not entitled to have all payments made by them in excess of the rate as now fixed refunded. The application for that purpose was not granted; the Commissioner holding that its order changing a rate was not retroactive, but would reduce the rate from the time of promulgation only.

RIDDLE, DEAN AND COMPANY, *Petitioners*, v. THE
PITTSBURGH AND LAKE ERIE RAILROAD COM-
PANY, *Defendant*.

Application Filed February 1st, 1888. Decided February 15th, 1888.

I. Rule stated in reference to applications for re-hearings.

The Commission will promptly and carefully examine an application for a re-hearing with a view to the immediate correction of any error of law or fact found to exist, but will not direct a re-hearing involving the expense to parties of appearing before the Commission for a re-argument, unless satisfied that such re-argument might have the effect of changing the result of what the Commission has already done.

The Statute is construed as dealing with the substance of things, and as contemplating, as far as this is possible, methods of procedure that are speedy and which come at once to the very right of questions arising in the transportation of persons and freight.

II. Where the relation of any carrier to the matter complained of is such that it is in whole, or in part, materially responsible for the alleged grievance, and has direct interest in any investigation of the subject-matter involved, and the merits of the controversy cannot be investigated and determined in the absence of such carrier as a party, then that carrier should be made a party to the proceeding, and if not a party, no relief can be had against it.

III. The report and findings of the Commission upon the evidence relates only to the ascertainment and presentation of all the material facts necessary to fairly and justly present the merits of the controversy, and the Commission does not report evidence which is only cumulative, or which is immaterial, or irrelevant, or mere details of evidence already embraced in substantial facts stated, upon which the findings and conclusions of the Commission are made.

J. L. Black, counsel for motion.

REPORT AND OPINION OF THE INTERSTATE COMMERCE COMMISSION
ON APPLICATION OF PETITIONERS FOR A RE-HEARING.

THE COMMISSION :

We have carefully considered the application made in the brief of petitioners' counsel for a re-hearing in this proceeding, and are constrained to deny it on the ground that no argument of counsel upon the evidence could change the result announced in our previous report and opinion by which the petition was dismissed. We feel it to be due to candor as well as justice to say that a re-argument by the

counsel of the parties upon a re-hearing would be a mere waste of time in addition to the unnecessary expense it would cause the parties and the useless labor it would entail upon their counsel. If, upon the whole evidence, we could see it was possible that any argument of counsel could change the result we would unhesitatingly grant the application for a re-hearing.

The main, controlling, and general grounds upon which we decided to dismiss the petition, as set forth in our report and opinion, are not controverted or questioned in the application for a re-hearing, nor, indeed, do we see how they could be, but several particulars are mentioned in which it is claimed we were mistaken in our findings upon the evidence. Two of these we notice briefly, the others having been disposed of in our previous report and opinion in accordance with the weight of the evidence.

No coke, it is claimed, was shipped in vessels from Cleveland or Ashtabula, and this, we think, is true upon a re-examination of the evidence. We were led to a contrary conclusion in our report and opinion by the following language of John Newell, president of the Pittsburgh and Lake Erie Railroad Company, on page 10 of his oral examination, before us: "There has been a large demand for coke for the Lake Superior region." Taking this language in connection with all else that was said on this subject by the same witness and the other evidence in the proceedings we are satisfied in using it he really meant by it that there was a larger demand for coke for smelting ore, which was the product of the Lake Superior mines; but that is wholly immaterial. The important fact was the unusual demand for coke and its shipment over the line of the railroad, and this remained the same whether it was taken by vessels at Cleveland and Ashtabula to the Lake Superior mines or not. The evidence shows that this coke was required in greater quantities than ever before for smelting ore produced in the Lake Superior mines, and that for this purpose it went not only to the mills and furnaces south, but also west of Cleveland, as well as at Cleveland itself, while the shipments of coal during the same period were quite as large, if not larger, than those of coke,

and coal was shipped in immense quantities from Cleveland and Ashtabula in vessels.

In the second place, it is claimed in the application for rehearing that other shippers of coal besides petitioners were demanding cars for coal to Buffalo during the period of which they complain. All the evidence, when considered together, upon this point, evidently refers to the cars of the Lake Shore and Michigan Southern Railway Company, and it shows that a few such were furnished at intervals, of which petitioners admit in their petition they received "forty cars," and this is more than the evidence shows that any other shipper received of these coal cars to Buffalo during that period. So that, upon the evidence, there was no unjust discrimination against petitioners in this respect even by the Lake Shore and Michigan Southern Railway Company; but, as we have already stated, that company is not a party to this proceeding. The complaint is against the Pittsburgh and Lake Erie Railroad Company, and there is no evidence that its cars were going to Buffalo or were expected by shippers to go to Buffalo with coal during the period complained of. The evidence shows also that the owners of these mines were quite willing for their coal to go to Cleveland instead of Buffalo, and that they were satisfied when they could get their proportion of cars to Cleveland, and were not disposed to make any issue about not receiving cars to Buffalo. This is, therefore, wholly immaterial to the result we have reached in dismissing the petition, except so far as it tends to further show that petitioners are entitled to no relief upon the evidence before us.

A peculiarity of this case has been that while the complaint is made against the Pittsburgh and Lake Erie Railroad Company the evidence in support of it is mainly directed at the Lake Shore and Michigan Southern Railway Company in the use of its cars over the line of the Pittsburgh and Lake Erie Railroad. Regarding this it is unnecessary to repeat here what we have already said elsewhere; but it may not be improper for us to state that where a complaint is expected to be prosecuted against any carrier that carrier should be made a party to the complaint and thus have an

opportunity to be heard in its defense. It is, however, sufficient for us to say, that the evidence makes no case for relief against the Pittsburgh and Lake Erie Railroad Company.

As this is the first application we have had for a re-hearing, it may also not be improper for us to state in this connection as every one of our reports and opinions will show upon its face, that in every case before us our findings upon the evidence relate only to the ascertainment of all the material facts necessary to fairly and justly present the merits of the controversy, and that to such facts as arise from immaterial or irrelevant evidence we give them no place in our reports and opinions. To do otherwise would be to make a book out of a case like the present, which contains more than three hundred pages of printed evidence and equally as much of written manuscript, and would accomplish no useful or just purpose whatever.

Where the delinquency charged is in the nature of a fraud, as in the present case, under the rules of law a wide range is allowed in the evidence that the complainants may, if they can, show the existence of the fraud, barricaded as it may be by devices, inventions, subterfuges, or pretenses, and it is indispensable to truth and justice that such latitude should be allowed. The party accused must in fairness and justice be allowed a correspondingly wide latitude in the evidence to show innocence of the fraud imputed to him. A great mass of evidence is the result. Some of it is merely circumstantial; some of it is unavoidably cumulative; other portions of it would be wholly irrelevant if not inseparably connected with some fact that is relevant; much of it is immaterial; large portions of it are explanatory, and thus it is presented in oral examinations, depositions, and documentary evidence.

Under such circumstances, when we have patiently and laboriously sifted out all the material facts necessary to fairly and justly present the merits of the controversy, with our conclusions thereon, we have done all that the statute authorizes or requires us to do. The statute deals with the substance of things, and contemplates, as far as this is possible, methods of procedure that are speedy and which come at once to the very right of questions arising in the transporta-

tion of persons and freight ; and while in its administration we will always cheerfully and carefully examine and consider all applications for re-hearings by a party to any proceeding decided by us who will point out any errors he may think we may have committed, either of law or fact, with a view to their prompt correction, if found to exist, yet we will not in any proceeding direct a re-hearing involving the expense to parties of appearing before us for a re-argument of the case and the further consumption of time on our part, which belongs to the public, unless satisfied that such re-argument might have the effect of changing the result of what we have already done.

The application of petitioners for a re-hearing is denied.

JOHN D. HECK AND L. J. A. PETREE v. THE EAST
TENNESSEE, VIRGINIA AND GEORGIA RAIL-
WAY COMPANY, THE KNOXVILLE AND OHIO
RAILROAD COMPANY, THE RICHMOND AND
DANVILLE RAILROAD COMPANY, THE RICH-
MOND AND WEST POINT TERMINAL AND
WAREHOUSE COMPANY, THE COAL CREEK
AND NEW RIVER RAILROAD COMPANY.

Heard December 9, 1887. Decided February 15, 1888.

A railroad company, chartered by the State of Tennessee, owns a short road wholly in that State, but has never owned any rolling stock nor operated its road. The road was used and operated as a means of conducting interstate traffic in coal by companies owning connecting interstate roads. Held, that the short road thus used is one of the facilities and instrumentalities of interstate commerce, and the carriers using it are subject to the provisions of the Act to Regulate Commerce.

In respect to such traffic the duties of such carriers to the public are the same without respect to ownership, corporate control, the authority or means of its construction.

As one of the "instrumentalities of shipment or carriage," it must be accessible to all interstate shippers on equal and reasonable terms. The public cannot be deprived of this right by the separate or joint action of the carriers, and they cannot be permitted to use it for purposes of discrimination between mine owners on its line.

The claim for pecuniary damages presents a case at common law, in which defendants are entitled to a jury trial.

Messrs. *Webb & McClung* and *S. F. Phillips* for petitioners.

W. M. Barter and *E. M. Johnson* for defendants, the East Tennessee, Virginia and Georgia Railway Company, and the Knoxville and Ohio Railroad Company.

J. T. Worthington for defendants, the Richmond and Danville Railroad Company, and the Richmond and West Point Terminal Warehouse Company.

E. R. Chapman for defendants, the Coal Creek and New River Railroad Company.

REPORT AND OPINION OF THE COMMISSION.

MORRISON, *Commissioner* :

The complaint against the defendants is, that on April 15, 1887, and continually since then, they refused to transport

coal which up to that time they had transported for the complainants from their mines in the Coal Creek coal field, in the State of Tennessee, to their customers in North Carolina and other States; that while so refusing to carry complainants' coal the defendants carried and continued to carry coal from said coal field since April 15, 1887, as they did before, for other miners and shippers; that in respect of the traffic in coal the defendants unjustly discriminate against the complainants and refuse to afford them the reasonable and equal advantages for forwarding coal afforded to others. Complainants ask that their rights as shippers of coal may be secured to them by order of this Commission, and that large pecuniary damages may be awarded to them which they claim for their alleged losses by non-shipment of their coal.

The Coal Creek and New River Railroad Company, answering separately, denies that it discriminates unjustly or at all against the complainants; denies that it refused to afford them any facilities afforded to other shippers of coal on the line of defendant's road; and denies that it refused the use of its track to the plaintiffs by the stoppage of the running thereon of engines and cars of other companies except by general refusal which applied to any and all use of its road or track. It alleges that any use of said track subsequent to such general refusal has been under an arrangement open alike to all shippers, and that no application has been made by complainants for any arrangement.

The East Tennessee, Virginia and Georgia Railway Company and the Knoxville and Ohio Railroad Company, two of the defendant companies, jointly answering, deny the existence of any facts which gives the right to or makes it the duty of said last-named company to operate the road of said Coal Creek and New River Company as against its consent and express orders; deny that they or either of them have ever managed or controlled said Coal Creek and New River road or run cars or engines over it at any time, except by its acquiescence and authority. They aver that subject to such acquiescence the Knoxville and Ohio Railroad Company heretofore ran its engines and cars, and engines and cars under its control, over the line of said Coal Creek and New

River road to accommodate coal miners on the line thereof, for which service a switching charge was made; that such service was discontinued on all of its road by order of said Coal Creek and New River Company, and with its authority and acquiescence restored on so much of its road as extends to the mine of the Excelsior Coal Company, and within one-fourth mile of complainants' mine. And except as above stated these defendants deny every other allegation of complainants and deny jurisdiction of the Commission to entertain the complaint.

The other defendants, the Richmond and Danville Railroad Company and the Richmond and West Point Terminal and Warehouse Company, each for itself, makes general denial of all that is alleged against them or either of them in the complaint which on the hearing is, by consent of parties, dismissed as to the two defendants last named.

From the testimony of witness and the uncontroverted statements made in the complaint and answers thereto, the facts are found to be as follows:

The complainants, under the firm name of Heck & Petree, were, from January 1, 1886, to April 15, 1887, engaged in mining and selling coal in the Coal Creek coal field in Anderson and Campbell counties, in the State of Tennessee, and in shipping coal from said coal field over the roads of defendants to markets and customers in North Carolina and other States. On and after April 15, 1887, said railroad companies refused to take or ship over their roads any coal of said firm.

The mine of said firm is one of several mines located on the line of the Coal Creek and New River Railroad Company's road, and coal shipped from the mine of said firm to market must be carried over said last-named road to the Knoxville and Ohio road, over it to its junction at Knoxville with the East Tennessee, Virginia and Georgia road, over said last-named road and its connections to the place of destination. The only outlet or means of reaching markets for coal mined in said Coal Creek coal field is over the line of the Knoxville and Ohio railroad.

The Coal Creek and New River Railroad Company is a

corporation chartered by the State of Tennessee. It owns a road or track three miles long; but never owned cars or other rolling stock, nor operated its road. The rolling stock used on its road was and is owned by the Knoxville and Ohio Railroad Company, which has done all the carrying done on said Coal Creek and New River road from the time it was built in 1880-81 up to April 15, 1887, when carrying on it was refused for complainants, but continued for other shippers.

A formal order was issued by the Knoxville and Ohio River Railroad Company discontinuing and forbidding further operations on the Coal Creek and New River railroad on and after April 15, 1887; operations by said Knoxville and Ohio Railroad Company were soon thereafter renewed on that part of said road extending to the Excelsior coal mine and within one-fourth of a mile of complainants' mine, and occasional transfers were made over the entire road; but all transportation was refused to complainants, who had orders for large quantities of coal, which they offered for shipment over defendants' roads.

The East Tennessee, Virginia and Georgia Railway Company and the Knoxville and Ohio Railroad Company are separate corporations, but their roads are part of the same system and are under substantially the same management. The former owns more than half of the capital stock of the latter, and the latter owns nearly one-half the capital stock, and (together with parties interested in its own road) owns a controlling interest in the capital stock of the Coal Creek and New River Railroad Company. The three companies were and are in accord and have acted in concert in the refusal to carry complainants' coal on the 15th day of April, 1887, and from then until now.

The Knoxville and Ohio road extends from its junction with the East Tennessee, Virginia and Georgia road at Knoxville northwardly to the Kentucky State line, and reaches said coal field at Coal Creek station from which a "Y"-shaped switch extends into said coal field and connects with said Coal Creek and New River road.

Said coal field is about eight miles in extent along the face of Cumberland mountain fronting to the southeast. A large

and considerable tract in the northeast part of said coal field is and was before said Coal Creek and New River railroad was built, owned by John M. Heck, lessor of complainants, while another large tract further to the northeast was owned by said John M. Heck and the Knoxville and Ohio Railroad Company jointly. The southwest part of said coal field is owned by other proprietors, among them some of the officers and persons interested in the defendants' roads.

The "Y" switch from Coal Creek station did not and does not so extend into said coal field as to reach the part owned by said John M. Heck, and the said Coal Creek and New River road was built by the Knoxville and Ohio Railroad Company and said Heck from said switch to and along that part of said coal field owned by said John M. Heck, thence to and along the part owned jointly by him and Knoxville and Ohio Railroad Company.

John M. Heck was president of the Coal Creek and New River Railroad Company from the time its road was built up to October, 1886, when he was succeeded by E. R. Chapman.

When Heck had been superseded it was claimed by the stockholders and others interested in the defendant companies that during his presidency he had used said road and allowed his lessees to use it without paying or causing to be paid anything to said company for such use of its road. The action taken by the defendants in respect of the refusal to transport the coal of said firm was taken to force said John M. Heck to a settlement with said company by hindering his lessees in their mining operations.

On these ascertained facts it is insisted on behalf of the Coal Creek and New River Railroad Company that it is not a common carrier and that its road is not any part of a line for continuous carriage from one State or Territory to another State or Territory.

This view is apparently based on the fact that the road of this company is wholly in the State of Tennessee, from which the company derives its corporate existence; that it owns no engine or cars, has not operated and does not of itself operate its road.

It is true that coal taken over its road has been drawn by the engines and carried in the cars of the other defendants, but for all practical purposes the road of this defendant is as much a part of the continuous line over which coal from plaintiffs' mine goes to market as is the "Y" switch which connects this road with the roads of the other defendant companies. In the history of its construction and of its use it was always treated as a part of the continuous line, and one of the instrumentalities by which the coal from this mine in Tennessee was expected to reach and did reach the markets in the other States.

If this road is one of the means by which commerce in coal is carried on between Tennessee and other States as an instrumentality of interstate commerce, its duties to the public under the Act to Regulate Commerce in respect to such traffic, are the same, without respect to its ownership, corporate control, the authority or means of its construction.

By the first section of the Act to Regulate Commerce the term "railroad" is made to include "all the road in use by any corporation operating a railroad, whether owned or operated under contract, agreement, or lease," and the term transportation is made to include "all instrumentalities of shipment or carriage."

This road has been operated by the Knoxville and Ohio Company from the time it was built. This has been done, as alleged in defendants' answer, by agreement or contract, since April 14, 1887. Presumably it was so done *before*. This would seem to bring this road within the reason of the provisions of the Act to Regulate Commerce relating to lines for continuous carriage from a State or Territory to another State or Territory, and make it, in connection with the roads of the other defendants, a part of such a line.

Yet, in the view we take of this case, the relief asked by complainants is not dependent upon this Coal Creek and New River Company being a common carrier, or upon its road being a part of a line for continuous carriage to other States.

Whatever else this road may or may not be, it is one of the means and facilities for shipment to and over lines from complainants' and other mines in Tennessee to market in

other States. It is one of the "instrumentalities of shipment or carriage" included in the term transportation, to which the Act to Regulate Commerce applies. As such it must be open and accessible alike to all shippers and on equal and reasonable terms. This is a right belonging to the public of which it cannot be deprived by the separate act or control of any one of the defendants, nor by the act of any or all of them combined.

The other defendant companies insist that they have no control over the Coal Creek and New River Company and deny that they have any legal right to operate or owe any duty to the public which require them, or either of them, to operate its road without the consent and against the express orders of said Coal Creek and New River Company. Neither denying nor admitting their legal obligation to do so they aver readiness to carry coal over said road with the acquiescence of the said New River Company, which acquiescence they claim to have had in all the carrying done over its road. This road is included in the term "railroad" or the term "transportation," or both, as defined in the Act to Regulate Commerce, when the defendants are permitted to make use of and to control it for their own purposes they have no legal right in doing so to refuse impartial accommodation. That such refusal would subject it to responsibility to the State laws is not questioned, and whether the company as owner of the road would be subject to the jurisdiction of this Commission is therefore not important. The East Tennessee, Virginia and Georgia Company operating its own line and the line of the Knoxville and Ohio Company, is an interstate road, and the traffic in question is interstate traffic; this short road is made use of by the other roads as a mere facility to such traffic. They cannot be permitted to make use of it, or any part of it, for the purposes of discrimination as between the mine owners upon it. The attempt to shelter themselves behind the action of the owners of the short road is but a pretense. The interstate roads control the other, and they cannot be allowed to abuse that control to oppress the public or any part of it.

The "Y" switch to the coal field did not and does not ex-

tend as far up as the mine of complainants on the coal lands owned by the lessor, separately or jointly, with the defendants' Knoxville and Ohio Company. To reach these lands their owners, Heck and the Knoxville and Ohio Railroad Company, built the New River road. Previous to October, 1886, Heck was president of the New River Company. The Knoxville and Ohio Company operated the Coal Creek and New River Company's road until April 15, 1887, for all shippers, and since then for all except complainants. Since it was built, new mines have been opened and investments made for the development of mines, in view of the transportation which this road afforded and of which it is a necessary part. It is neither good faith nor legally right to deny its use to the sole purpose of its construction.

The misunderstanding and disagreement between Heck and the stockholders or others interested in the defendants' roads has furnished a pretext for, but does not justify the illegal act of defendants in refusing to transport the coal of complainants, which was done to bring Heck to terms. The public, of which the complaining firm is a part, cannot wait for its rights while stockholders or persons interested in the defendant companies adjust their accounts or settle their differences.

The complainants and other miners on the line of said Coal Creek and New River road are entitled to have their coal carried over it to its connecting road and thence to destination.

The claim for pecuniary damages made by complainants was not entertained on the hearing, because it presents a case at common law in which the defendants are entitled to a jury trial.

It is therefore found that the conduct of the defendants in failing and refusing to receive coal for interstate transportation when tendered by complainants, was in contravention of the provisions of the Act to Regulate Commerce; and it is ordered that said defendants and each of them forthwith cease and desist from such failure and refusal, and henceforward receive and forward coal when so offered for transportation on any part of the line of said Coal Creek and New River railroad upon just, reasonable, and equal terms.

GEORGE RICE *v.* THE LOUISVILLE AND NASHVILLE
RAILROAD COMPANY.

THE SAME COMPLAINANT *v.* THE ST. LOUIS, IRON
MOUNTAIN AND SOUTHERN RAILWAY COMPANY.

THE SAME COMPLAINANT *v.* THE MOBILE AND OHIO
RAILROAD COMPANY.

THE SAME COMPLAINANT *v.* THE CINCINNATI, NEW
ORLEANS AND TEXAS PACIFIC RAILWAY COM-
PANY.

THE SAME COMPLAINANT *v.* THE CINCINNATI, NEW
ORLEANS AND TEXAS PACIFIC RAILWAY COM-
PANY AND THE ALABAMA GREAT SOUTHERN
RAILWAY COMPANY.

THE SAME COMPLAINANT *v.* THE MISSISSIPPI AND
TENNESSEE RAILROAD COMPANY.

THE SAME COMPLAINANT *v.* THE NEWPORT NEWS
AND MISSISSIPPI VALLEY COMPANY AND THE
LOUISVILLE, NEW ORLEANS AND TEXAS RAIL-
ROAD COMPANY.

THE SAME COMPLAINANT *v.* THE NEWPORT NEWS
AND MISSISSIPPI VALLEY COMPANY AND THE
ILLINOIS CENTRAL RAILROAD COMPANY.

THE SAME COMPLAINANT *v.* THE ILLINOIS CENTRAL
RAILROAD COMPANY.

Hearing for taking Testimony Nov. 21 to 28, 1887. Hearing for Argument
January 16, 17, 18, 1888. Decided February 23, 1888.

When for a special traffic, *e. g.*, the transportation of petroleum oils—a car-
rier provides rolling stock for one method, but does not provide it for
another for which it publishes rates, but the shippers are expected to
provide the same, the terms on which such rolling stock is to be pro-
vided should be uniform and be published with the rate sheets, and can-
not lawfully be left to be the subject of bargain and of different terms in
the case of different shippers.

It is properly the business of a carrier by railroad to supply the rolling stock
for the freights he offers or proposes to carry; and if the diversities and

peculiarities of traffic are such that this is not always practicable, and consignors are allowed to supply it for themselves, the carrier must not allow its own deficiencies in this particular to be made the means of putting at unreasonable disadvantage those who make use in the same traffic of the facilities it supplies.

When two methods for the transportation of an article of merchandise are nominally offered by the carrier, for only one of which it offers rolling stock, and for the other of which the shipper must supply his own rolling stock at considerable expense, it cannot be said that the resort to the latter by the shipper is so far a matter of choice that he has no concern with the charges for transportation in the other mode. The man of small means being compelled to make this choice by reason of the carrier's failure to supply rolling stock for the other mode, has a right to insist that the charges by transportation in the two modes shall be relatively just and equal.

When oil is transported in tanks permanently affixed to car bodies, the tank is to be considered as part of the car; and for oil transported therein the charge for transportation should be the same by the hundred pounds that the carrier charges for transportation between the same points of barrels filled with like oil and taken in car-load lots. The carrier is guilty of unjust discrimination if the shipper in barrels is charged a higher rate.

Neither the fact that the shipper in the one case supplies the rolling stock, nor the alleged fact which is not found sustained—that for the tanks there is a greater probability of return loads, nor the further alleged fact that with barrel shipments there are greater risks to the carrier's property and that which it carries, can justify imposing upon the barrel shipments the greater burden.

Under this rule the carrier will be at liberty, and will be expected to make to the owner of tank cars a reasonable allowance for their use.

When an important question is raised by the pleadings in a case, the determination of which will affect others quite as much as the parties before the Commission, but the parties give their attention almost exclusively to other questions, and neither by the evidence nor in argument supply the Commission with the information to enable it to be understandingly determined, the Commission will decline to decide it, and leave the parties to bring it forward again as they may be advised.

A. D. Follett, W. B. Loomis, J. Randolph Tucker, and Franklin B. Gowen, for complainant.

Edward Barter and L. H. Noble, for defendant L. & N. R. Co.

John S. Blair, for defendant St. L., I. M. & S. Ry. Co.

E. L. Russell, for defendant M. & O. R. R. Co.

Edward Colston and Charles M. Cist, for defendants C. N. O. & T. P. Ry. Co., & Ala. G. S. R. R. Co.

Holmes Cummins, for defendants N. N. & M. Co. & L. N. O. & T. R'y. Co.

H. D. Money, for defendants Miss. & Tenn. R. R. Co. & Ill. Cent. R. R. Co.

OPINION OF THE COMMISSION.

COOLEY, *Chairman* :

The questions at issue in these cases are to some extent identical, and where not the same, are so far similar that it was deemed practicable by the parties that they should all be tried together. They have accordingly been so tried, the evidence being, by consent, taken in the case first entitled, but received and applied in each of the others, so far as it was found to be applicable. The principal grievance complained of is that the defendant companies discriminate against the complainant in their charges for the transportation of petroleum oil, but the rates for the transportation of the oil in barrels, which is the method made use of by complainant, are also alleged to be excessive, and in some cases a violation of the fourth section of the Act to Regulate Commerce is complained of. The petition in the case first entitled, after setting out the line of the defendant's road and the cities and other points reached thereby, proceeds to say :

“ That one of the important duties of said Louisville and Nashville Railroad Company is the transportation of refined illuminating petroleum oil (mostly produced and manufactured in the States of Pennsylvania and Ohio) from Cincinnati, Ohio, and Louisville, Kentucky, to the afore-named cities and other points on the said carrier's said lines of railroad in the said several states and other states into and through which said carrier's railroad lines pass.

“ That such oil is an article of extensive commerce and of prime necessity to the people reached by said carrier's railroad lines, and that in the transportation of such oil by said carrier two prevailing methods are employed, one by means of box cars, carrying the oil in barrel packages, and the other by iron tank cars, generally holding 100 barrels and upwards, built and used for that express purpose.

“ And said complainant further says that he is engaged at

Marietta, Ohio, and in that vicinity in the business of producing, manufacturing, and dealing in such petroleum oils, and shipping the same to various markets in the Southern and Western States of this country; that he has large capital invested in this business and extensive facilities therefor, and, but for the acts of said carrier hereinafter complained of, would produce and sell many thousands more barrels of such oil than now; that many of his principal markets for his said manufacture are in the territory reached and traversed by said carrier's system of railways; that it is absolutely essential to the continued existence and success of his said business that he should have rates and facilities both reasonable in themselves and equally as favorable as those accorded to his competitors for the transportation of said products to such markets, many of which can only be reached by said carrier's roads and none of which can be reached as conveniently or cheaply by any other means, if said complainant is accorded reasonable and just rates by said carrier.

“Complainant further states that the Standard Oil Company, a corporation organized and existing in and under the laws of the State of Kentucky, is a very extensive dealer in and shipper of such petroleum oils, and is his chief and almost sole competitor for the sale thereof in the aforesaid markets.”

“And said complainant further states that said carrier has been guilty of violation of the provisions of the Act of Congress of the United States of America entitled ‘An Act to Regulate Commerce,’ approved February 4, 1887, and which took effect April 5, 1887, in the following particulars, to wit:

“First charge. By making charges for services to be rendered by said carrier in the transportation of such as aforesaid from Cincinnati, Ohio, and said Louisville, Kentucky, to points on the said carrier's said railroad lines in the said states other than Ohio and Kentucky, which were in themselves unjust and unreasonably high.

“Under this charge the complainant makes the following specifications, each and all of which are rates per 100 pounds charged by said railroad company on May 9, 1887, and as

complainant is informed and believes and so alleges, ever since that day for services to be rendered by said company in the transportation in barrel packages in car-load shipments of such oils from said Louisville, Kentucky, to the respective destinations named, each and all of which destinations are points reached by the lines of railroad owned, leased, and operated by said railroad company, and each and all of which rates complainant alleges to be unreasonable and unjust.

“ 1. Mobile, Ala., 30 cents.

“ 2. New Orleans, La., 30 cents.

“ 3. Montgomery, Ala., 45 7-10 cents.

“ 4. Selma, Ala., 45 7-10 cents.

“ 5. Birmingham, Ala., 45 7-10 cents.

“ 6. Nashville, Tenn., 18 $\frac{1}{4}$ cents.

“ 7. Memphis, Tenn., 15 cents.

“ 8. Clarksville, Tenn., 16 3-10 cents.

“ 9. All other points reached by said lines of railroad located in states other than Kentucky, the rates of which appear in the statement of rates required by said Act of Congress and on file with said Commission, and each and all of which rates complainant alleges to be unreasonable and unjust. Complainant, under said charge, also makes the following specifications, each and all of which are the rates per 100 pounds charged by said railroad company for the transportation of such oils in barrel packages, in car-load shipments from Cincinnati, Ohio, to the respective destinations named, each and all of which are points reached by the lines of the railroad owned, leased, and operated by defendants, and are in states other than the state of Ohio, which rates appear on the tariff sheets of defendant, furnished by it to complainant May 9, 1887, as showing its rates then in force, and which rates complainant is informed and believes and alleges have ever since been in force, each and all of which rates complainant alleges to be unreasonably high and unjust.

“ 10. Nashville, Tenn., 25 cents.

“ 11. Decatur, Ala., 50 cents.

“ 12. Birmingham, Ala., 59 cents.

- " 13. Calera, Ala., 59 cents.
- " 14. Montgomery, Ala., 59 cents.
- " 15. Selma, Ala., 59 cents.
- " 16. Pensacola, Fla., 45 cents.
- " 17. Mobile, Ala., 39 cents.
- " 18. New Orleans, La., 39 cents.

" Second charge. Complainant, for a second charge against defendant, alleges that defendant has ever since April 5, 1887, charged complainant for services to be rendered by the defendant in the transportation of such oils for complainant from said Cincinnati, Ohio, to points in states other than Ohio reached by the lines of railroad owned, operated, and leased by defendant, and from Louisville, Kentucky, to points in states other than Kentucky reached by said lines of railroad, a greater compensation than it charged said Standard Oil Company of Kentucky for like and contemporaneous services rendered and to be rendered by defendant for said company in the transportation of such oils for said company, said company being sometimes consignee thereof and sometimes consignor thereof, and sometimes both consignee and consignor thereof from said Cincinnati, Ohio, to said points in states other than Ohio, and from said Louisville, Kentucky, to said points in states other than Kentucky, all of said transportation, both for complainant and said Standard Oil Company, being under substantially similar circumstances and conditions.

" Under the above charge complainant makes the following specifications :

" 1. The following is a statement of the rate per one hundred pounds charged by defendant on May 9, 1887, and ever since to complainant and to said Standard Oil Company of Kentucky for the transportation of such oils from Louisville, Kentucky, to the respective destinations named :

DESTINATION.	TO GEORGE RICE.	TO STANDARD OIL CO.
Montgomery, Ala.....	45 7-10 cents.	30 cents.
Selma, Ala.....	45 7-10 "	30 "
Birmingham, Ala.....	45 7-10 "	80 "
Nashville, Tenn.....	18½ "	15 "
Memphis, Tenn.....	15 "	12½ "

“2. The following is a statement of the rate per one hundred pounds charged by defendant on May 9, 1887, and ever since to complainant and said Standard Oil Company of Kentucky, respectively, for the transportation of such oils from Cincinnati, Ohio, to the respective destinations named :

DESTINATION.	TO GEORGE RICE.	TO STANDARD OIL CO.
Decatur, Ala.....	50 cents .	46 cents.
Birmingham, Ala.....	59 “	47 “
Calera, Ala.....	59 “	47 “
Montgomery, Ala.....	59 “	47 “
Selma, Ala.....	59 “	47 “
Pensacola, Fla.....	45 “	40 “
Mobile, Ala.....	39 “	34 “
New Orleans, La.....	39 “	34 “

“3. Defendant has in all its charges to complainant for services rendered and to be rendered by it in the transportation of oils for him over its said lines of railroad charged him for the entire actual weight of such oils, while defendant has in many instances, too numerous to mention without unduly encumbering the record, since April 5, 1887, charged said Standard Oil Company for services rendered it or to be rendered by it for said Standard Oil Company in transportation of oils over its said lines of railroad for much less than the actual weight of such oils.

“4. The freight rate charged by defendant to complainant ever since April 5, 1887, for the transportation of such oils in barrel packages, car-load shipments, owner's risk, from Louisville, Kentucky, to Huntsville, Alabama, is 37 cents per 100 pounds, including the weight of barrels, which is the rate for such transportation appearing in the tariff sheet of defendant in force ever since April 5, 1887, yet about May 1, 1887, a car-load of oil, containing 66 barrels of oil, weighing, including barrels, 24,750 pounds, was delivered by said Standard Oil Company to defendant at Louisville, Kentucky, to be transported to Huntsville, Alabama. Said oils were consigned to Halsey Bros., at Huntsville, Alabama, who were the agents at said place of said Standard Oil Company and competitors in business at said point with complainant. Said oils were

transported from Louisville, Kentucky, to Huntsville, Alabama, and the charge made by defendant for such transportation was \$68.07, or 27½ cents per 100 pounds.

“Third charge. Complainant, for a third charge against defendant, says that the defendant in its rates charged by it for services rendered and to be rendered by it for the transportation of said oils for complainant and said Standard Oil Company from Cincinnati, Ohio, to points reached by defendant's said lines of railroads in states other than Kentucky, has, since April 5, 1887, uniformly made and given undue and unreasonable preferences and advantages to said Standard Oil Company of Kentucky and to certain localities on its lines of railroad, and has subjected complainant and certain localities on its lines of railroad to undue and unreasonable prejudices and disadvantages.”

“Under the above charge complainant makes the following specifications :

“1. Complainant here repeats under this charge specification No. 1 under the second charge of his complaint, and alleges that the differences in the circumstances surrounding the shipments of said George Rice and said Standard Oil Company, and that any differences to defendant in the cost and expense and convenience of transportation of such oils of said George Rice and said company, respectively, and any differences between the circumstances under which said George Rice and said company, respectively, ship their oils justifying any difference in rate, if there be any, are small and insignificant in comparison with the differences in the rates so charged them, respectively.

“Complainant here repeats under this charge specification No. 2 under the second charge of his complaint, and alleges that the differences in rates therein appearing are not measured by any differences in the circumstances surrounding the shipments of said George Rice and said Standard Oil Company, and that any differences to defendant in the cost and expense and convenience of transporting such oils for said Rice and said company, respectively, and any differences between the circumstances under which said Rice and said company, respectively, ship their oils justifying any differ-

ence in rate, if there be any, are small and insignificant in comparison with the differences in the rates charged them, respectively."

"Complainant is informed and believes and therefore states that—

"3. Defendant owns a number of tank cars, as hereinbefore described, and furnishes the same to the said Standard Oil Company for its use in transporting oil shipped by said company from Cincinnati, Ohio, to points reached by defendant's said lines of railroad in States other than Ohio, and from Louisville, Kentucky, to points reached by defendant's said lines of railroad in States other than Kentucky, but refuses to furnish the same to said George Rice for his use in transporting oil from said Cincinnati, Ohio, and Louisville, Kentucky, to such points in States other than Ohio and Kentucky."

"4. Defendant in its freight rates for the transportation of such oils from Cincinnati, Ohio, to points reached by defendant's said lines of railroad in States other than Ohio, and from Louisville, Kentucky, to points reached by defendant's said lines of railroad in States other than Kentucky almost uniformly, since April 5, 1887, has charged a higher rate per 100 pounds for oil transported by it in barrel packages, in car-load shipments, owner's risk, than it charged per 100 pounds for such oils transported by it at the same time between the same points contained in tank cars, owner's risk, while at no time has there been any difference between the cost, expense, and convenience of transporting said oil by said two methods or any circumstances justifying a difference of rate between said two methods of transportation which even approximated the differences in defendant's freight rates for transportation by said two methods any differences between the cost, expense, and convenience to defendant of transportation by said two methods, or any circumstances justifying a difference in rate between said two methods being slight and insignificant compared with the differences in rate between said two methods actually made by defendant. Complainant ships his oils over defendant's lines of railroad exclusively in barrel packages, while said

Standard Oil Company ships its oil over defendant's lines of railroad almost exclusively in tank cars.

"5. Defendant's freight rates per 100 pounds for the transportation of such oils from Louisville, Kentucky, to the following destinations are the same whether the oil is carried in barrel packages or in tank cars :

Mobile, Ala.

Jackson, Miss.

New Orleans, La.

Jackson, Tenn.

Meridian, Miss.

Vicksburg, Miss.

" While defendant's freight rates per 100 pounds for the transportation of such oils from Louisville, Kentucky, to nearly all, if not all, the other points reached by defendant's lines of railroad in States other than Kentucky are much higher for oils carried in barrel packages than for oils carried in tank cars."

" 6. Defendant's freight rates per 100 pounds for the transportation of such oils from Cincinnati, Ohio, to Nashville, Tennessee, and Mobile, Alabama, are the same whether the oil is carried in barrel packages or in tank cars, whilst the defendant's freight rates per 100 pounds for the transportation of such oils from Cincinnati, Ohio, to nearly all, if not all, the other points reached by defendant's lines of railroad in States other than Ohio are much higher when the oils are carried in barrel packages than when the oils are carried in tank cars."

" 7. Defendant has, since April 5, 1887, charged for the transportation of oils from Cincinnati, Ohio, and from Louisville, Kentucky, to Birmingham, Alabama, Calera, Alabama, Montgomery, Alabama, and Selma, Alabama, the same freight rates in all cases to each of said localities, although by defendant's line of road said Calera is 33 miles farther from said Cincinnati and said Louisville than said Birmingham, and said Montgomery is 63 miles farther from said Cincinnati and said Louisville than said Calera, and said Selma is 50 miles farther from said Cincinnati and said Louisville than said Montgomery; and oils transported by defendant from Cincinnati, Ohio, or Louisville, Kentucky, to said Selma are necessarily carried by it through said Birmingham, said Cal-

era, and said Montgomery, and the distance from said Cincinnati to said Selma over defendant's line of road is 650 miles, and the distance from said Louisville to said Selma over defendant's line of road is 540 miles."

"Fourth charge. Complainant, for a fourth charge against defendant, says that defendant has, since April 5, 1887, charged and received for the transportation by it of such oils from Cincinnati, Ohio, and Louisville, Kentucky, to points reached by defendant's said line of railroad in States other than Ohio and Kentucky a greater compensation in the aggregate for a shorter than for a longer distance over the same line in the same direction, the shorter being included within the longer distance, such oils being a like kind of property in all cases and such transportation being under substantially the same circumstances and conditions."

"Under the above charge complainant makes the following specification: The rate charged by defendant for the transportation of such oils in barrel packages in car-load shipments from Cincinnati, Ohio, to and from Louisville, Kentucky, to destinations named below, with the distances of each destination from the place of shipment over defendant's said line of railroad, are as follows:

"From Cincinnati, Ohio:

DESTINATION.	DISTANCE.	RATE PER 100 POUNDS.
New Orleans, La.....	921 miles.	89 cents.
Birmingham, Ala.....	504 "	59 "
Mobile, Ala.....	780 "	82 "

"From Louisville, Kentucky:

DESTINATION.	DISTANCE.	RATE PER 100 POUNDS.
New Orleans, La.....	811 miles.	85 cents.
Birmingham, Ala.....	594 "	52 "
Mobile, Ala.....	780 "	85 "

"Said complainant further alleges that the aforesaid discriminations against him in rates and the aforesaid unreasonably high and unjust rates charged him have had, and as he believes were designed to have, the effect to give to the Standard Oil Company an almost complete monopoly of the

traffic in such oils at the points reached by said defendants' lines of railroad, and to exclude said complainant's products from nearly all of said points, and that such discriminations and charges, as complainant is informed and believes and therefore states, have been made by said defendant at the dictation of said Standard Oil Company, and he states that by reason of the premises he has been largely injured in his business and has lost large profits that he otherwise would have realized; that his facilities in all other respects than for said transportation during all the time since April 5, 1887, have been ample for the transaction of a large and profitable business in the sale of said oils in said markets, and that but for the premises he would have prosecuted such business to the limits of his facilities with great profit to himself.

"Your said complainant therefore prays that your Honorable Commission will proceed to inquire into the matters hereinbefore complained of and ascertain and find the facts with respect to the alleged violation of the said act of Congress, and the extent to which said complainant has been injured and is entitled to reparation, and report the same with your conclusions and recommendations according to law; and further that your Honorable Commission will notify said defendant to cease and desist from such violations, and make such reparation, and will take such further action as is lawful and proper in the premises."

The petition was duly verified and was filed July 22, 1887.

The answer of defendant is also given in full, with the omission only of formal averments and such recitals as are not necessary to an understanding of the issues made. Defendant "admits that in the transportation of said oil to some, if not all, of aforesaid towns and cities two methods are employed—one by means of box cars, carrying oil in barrel packages, the other by iron tank cars, generally holding, not one hundred, but sixty barrels or over that amount.

Further answering, defendant says it does not know but believes that complainant Rice is engaged at Marietta, Ohio,

or in that vicinity in the business of producing, manufacturing, and dealing in petroleum oils, and in shipping the same to various markets in the Southern and Western States of this country, but whether he has large capital or what amount of capital he has invested in said business, or whether he has extensive facilities or what facilities he has therefor defendant does not know, nor can he speak, for his belief or otherwise, but it denies that but for the alleged acts of this defendant in complainant's said bill complained of he would produce or sell many thousand more or any more barrels of such oil than he now produces and sells. Defendant admits that many of complainant's principal markets for his said manufactures are in the territory reached and traversed by this defendant's system of railways; that it is absolutely essential to the continued existence and success of his said business, that he should have rates and facilities both reasonable in themselves and equally as favorable under similar circumstances and conditions as those accorded to his competitors for the transportation of said products to such markets, and defendant admits that many of them can only be reached by defendant's roads, but it denies that none of said markets can be as conveniently or cheaply reached by any other means if complainant is accorded reasonable and just rates by this defendant. Defendant admits that the Standard Oil Company is a corporation, incorporated and organized under the laws of Kentucky, and that it is a very extensive dealer in and shipper of such petroleum oil, and defendant believes that said Standard Oil Company is the chief competitor of complainant for the sale thereof in the aforesaid markets.

“For answer to the first charge made in complainant's bill and specifications thereunder, defendant says :

“(1.) It is not true, and it denies that it has been guilty of any violations of the provisions of the act of Congress of the United States entitled “An Act to Regulate Commerce,” approved February 4, 1887, either by making charges for services to be rendered by it as common carrier in the transportation of oil from Cincinnati, Ohio, or Louisville, Kentucky,

to points on its railroad lines in States other than the States of Ohio or Kentucky, or in any other manner.

“(2.) It admits that on May 9, 1887, and ever since that time for services to be rendered by it in the transportation in barrel packages, in car-load shipments, of petroleum oil from Louisville aforesaid to Mobile, Ala.; New Orleans, La.; Montgomery, Ala.; Selma, Ala.; Birmingham, Ala.; Nashville, Tenn.; Memphis, Tenn., and Clarksville, Tenn., its charges were the respective prices set out in complainant's bill of complaint, and it also admits that each one of said towns is reached by its lines of road and the South and North Alabama railroad, except Selma, Ala., which cannot be reached thereby, but defendant says it is not true and it denies that said rates or any of them are unreasonably high or unjust.

“(3.) Defendant denies that the rate or rates to all other points or to any point reached by its lines of railroad, located in any State other than Kentucky, fixed by it in its schedule required by law to be and which has been filed with the Honorable Commission are or is unreasonable or unjust.

“(4.) It admits that the following rates per 100 pounds for shipment of petroleum oil in barrel packages, car-load shipments, from Cincinnati, Ohio, to the following points in States other than Ohio are the rates which appear on its tariff sheets furnished by it to complainant on May 9, 1887, as the rates then in force, and they are rates which are now in force, to wit:

“Nashville, Tenn., 25 cents.

“Decatur, Ala., 50 cents.

“Birmingham, Ala., 59 cents.

“Calera, Ala., 59 cents.

“Montgomery, Ala., 59 cents.

“Selma, Ala., 59 cents.

“Pensacola, Fla., 45 cents.

“Mobile, Ala., 39 cents.

“New Orleans, La., 39 cents.

“Except that the rate furnished for shipment to Nashville, Tenn., was 28 $\frac{1}{2}$ instead of 25 cents; that to Pensacola was 40

cents instead of 45 cents; that to New Orleans and that to Mobile was 34 cents each instead of 39 cents; and defendant admits that all of said points are reached by its lines of road, except Selma, and except all points between Decatur and Montgomery, Ala., which cannot be thus reached, but defendant says it is not true and it denies that said rates or any of them are unjust or unreasonably high.

“For answer to the second charge made in complainant's bill and the specifications thereunder defendant—

“(1.) Denies that it has at any time since April 5, 1887, charged complainant for services to be rendered by this defendant in the transportation of such oils to points in States other than Ohio reached by its lines of railroad, or from Louisville, Ky., to points in States other than Kentucky reached by said lines of railroad, a greater compensation than it charged said Standard Oil Company of Kentucky for like and contemporaneous services rendered or to be rendered by this defendant for said company in the transportation of such oils for said company from said Cincinnati, Ohio, or from Louisville, Ky., to said points or any of them in States other than Kentucky, and denies that the shipments referred to by complainant in his said bill were made for him and for said Standard Oil Company under substantially similar circumstances or conditions.

“(2.) It admits that the rate per 100 pounds charged by it to complainant on May 9, 1887, and ever since for the transportation of such oil from Louisville, Ky., to the respective destinations named in complainant's bill is the rate given therein, to wit:

“To Montgomery, Ala., 45 7-10 cents; Selma, Ala., 45 7-10 cents; Birmingham, Ala., 45 7-10 cents; Nashville, Tenn., 18 $\frac{3}{4}$ cents; Memphis, Tenn., 15 cents, and that on some oil shipped by it during that time for the Standard Oil Company defendant charged from Louisville to said respective points per 100 pounds the following rates, as stated in complainant's bill, to wit:

“To Montgomery, 30 cents; to Selma, 30 cents; to Birmingham, 30 cents; to Nashville, 15 cents, and to Memphis, 12 $\frac{1}{2}$ cents.

“(3.) It further admits that its rate to complainant on May 9, 1887, and ever since, for shipments of oil from Cincinnati, Ohio, to the following points, per 100 pounds, were the rates stated in complainant's bill, to wit:

“To Decatur, Ala., 50 cents; to Birmingham, Ala., 59 cents; Calera, Ala., 59 cents; Montgomery, Ala., 59 cents; Selma, Ala., 59 cents; to Pensacola, Fla., 45 cents; to Mobile, Ala., 39 cents, and to New Orleans, La., 39 cents, with the exception that the charge was and is from Cincinnati to Pensacola 40 cents, instead of 45 cents, and to Mobile and to New Orleans each 34 cents, instead of 39 cents; and the defendant further admits that during said time it was shipping some oil for the Standard Oil Company from Cincinnati to aforesaid towns at the following rates per 100 pounds, to wit: To Decatur, 46 cents; to Birmingham, 47 cents; to Calera, 47 cents; to Montgomery, 47 cents; to Selma, 47 cents; to Pensacola, 40 cents; to Mobile, 34 cents; to New Orleans, 34 cents, except that to Birmingham, since May 11, 1887, the rates have been a little less than 47 cents per 100 pounds. But defendant denies that in its said rates for shipment for the Standard Oil Company and for complainant from Cincinnati and from Louisville, respectively, to aforesaid respective towns or any of them, it discriminated in favor of the Standard Oil Company or against complainant, or that by said rates, shipped under the circumstances that said oils were respectively shipped, defendant charged complainant per 100 pounds a greater compensation than it charged said Standard Oil Company.

“Defendant says that all the rates for shipments for complainant made so as aforesaid from Cincinnati and from Louisville, respectively, to aforesaid respective towns were made for shipments in barrel packages and car-load shipments, and all of the rates for shipments for the Standard Oil Company so as aforesaid from Cincinnati and from Louisville, respectively, to said respective towns were made for shipments in tank cars, cost of transportation or the shipment and risk of which is much less than the cost of transportation or shipment and the risk of a like quantity of oil in barrels; that the rate paid or to be paid as aforesaid

by complainant for such shipments is the same rate per 100 pounds, neither greater nor less than was and is by defendant charged to and paid by the Standard Oil Company for shipments of oil in barrel packages, car-load shipments, at the same time and from and to the same points that said shipments for complainant were made; and defendant also states that at the same rates charged the Standard Oil Company for the shipments of its oil so as aforesaid in tank cars from Cincinnati and from Louisville, respectively, to said several respective towns complainant could have shipped, as he well knew, his oil in like kind of tank cars at any time on or after the 9th day of May, 1887, and the same rates as aforesaid were offered him and published in defendant's schedules of rates furnished the honorable Interstate Commission.

“(4.) Defendant admits that in its shipment of oil in barrels for complainant it has charged or intended to charge him for the actual weight of such oils, and it has also charged or intended to charge in its shipments of oil in barrels for the Standard Oil Company for the actual weight of such oils, and it denies that it has in any shipment of oil in barrels made any difference in this respect between oil shipped for complainant and oil shipped for the Standard Oil Company.

“Defendant says that as to the shipment of oil in tanks for the Standard Oil Company and everybody else the same is not and never has been weighed, but the quantity contained in the tanks is estimated at a certain number of pounds, and it may be true that in some shipments for the Standard Oil Company that estimates were below the actual weight, but the same quantity of oil could have been shipped in the same manner at the same price by complainant.

“(5.) Defendant denies that about May 1, 1887, it transported or contracted to transport a car-load containing 66 barrels of oil and weighing 24,750 pounds, or any other weight, from Louisville, Ky., to Huntsville, Ala., for the Standard Oil Company, for \$68.07, or 27½ cents per 100 pounds; at least, no record of such shipment can be found on defendant's books.

“For answer to the third charge made in complainant's bill and the specifications thereunder, defendant—

“(1.). Denies that in its rates charged by it for services rendered or to be rendered by it for the transportation of said oils for complainant and the said Standard Oil Company from Cincinnati, Ohio, to points or any point reached by defendant's line of railroads in states other than Ohio and Kentucky it has, since April 5, 1887, uniformly or at all made or given undue or unreasonable preferences or advantages to said Standard Oil Company or to certain or any localities on its lines of railroad, nor has it subjected complainant or certain or any localities on its lines of railroad to undue or unreasonable prejudices or disadvantages.

“(2). Defendant says, in reference to the difference in rates to complainant and Standard Oil Company, respectively, appearing in specifications No. 1 and No. 2, under the second charge in complainant's bill of complaint, it denies that said differences are not measured, but avers that they are, by the differences in circumstances surrounding these shipments, respectively; and defendant denies that the difference to it in the cost and expense and convenience of transportation of such oils for complainant and the Standard Oil Company, respectively, or that the difference between the circumstances under which complainant and said company, respectively, ship their oils do not, but it avers that they do justify the difference in rates made to said parties, respectively, and it denies that they are either small or insignificant in comparison with the differences in the rates so charged; and defendant says that said rates so made for the shipment of the oils for the Standard Oil Company were made for shipment of oil to be made in large and regular shipments in iron tank cars, which tank cars were to be furnished and the cars kept in repair by said Standard Oil Company free of expense to defendant, which oil was never on defendant's premises and there at its risk, and by which cars defendant was furnished with return loads, while the rates thus made to complainant were made in reference to the shipment of oil in barrel packages, in small quantities and irregular shipment, to be received and loaded by defendant at its expense, and held at its risk while on its premises, and the cars used for barrel shipments were thus greatly injured and rendered of

less value to defendant for general purposes and were returned usually empty, so that, as this defendant believes and charges, the circumstances and conditions under which the shipments of oil for the Standard Oil Company were made were so dissimilar from the circumstances and conditions under which the oil for complainant was shipped as to justify and authorize the difference in rates to said Standard Oil Company and to complainant made so as aforesaid.

“(3.) Defendant says it is not true and it denies that it owns or ever did own any tank cars, or that it ever furnished to said Standard Oil Company such cars, or that it refuses or ever refused to furnish such cars to complainant, or that he ever applied for such ; but defendant says if complainant had applied for such cars he would have been refused for the reason that defendant did not and does not own or have such cars.

“(4.) Defendant admits that it has since April 5, 1887, in its freight rates charged a higher rate per 100 pounds for transportation of oil in barrels than for oil in tanks, except when the competition with water lines and railroads or competition between markets or products has forced a reduction in rates on oil in barrels to the same or nearly the same rates charged upon oil in tank cars ; but it is not true and defendant denies that the difference between the cost, expense, and convenience of transportation of oil by the two methods has been out of proportion to the difference between the rates by the two methods, and denies in said difference in expense, cost, and convenience is slight or insignificant, but, on the contrary, defendant avers that they were so great as to justify, as it believes, the difference in rates charged.

“(5.) Defendant admits that complainant ships in barrels all the oils he ships over this defendant's lines of railroad, but it is not true and it denies that the Standard Oil Company ships in tank cars almost all the oil which it ships over defendant's lines of railroad. Defendant says that said Standard Oil Company since April 5, 1887, has shipped over its lines of railroad in barrel packages, car-load shipments, a much greater quantity of oil than complainant has, and at the same price from and to the same points, and it has ship-

ped over its lines of railroad during that period about twice as much oil in barrels as it has shipped in tank cars.

“(6.) Defendant admits that the rate of transportation of oil from Louisville to the following destinations are the same whether the oil is carried in barrel packages or in tank cars, to wit: Mobile, Ala., Meridian, Miss., Jackson, Tenn., New Orleans, La., Jackson, Miss., Vicksburg, Miss., and that the rates are the same for shipments from Cincinnati to Nashville, Tenn., and Mobile, Ala., and such is true, not as a matter of choice of this defendant, but because the competition with water lines, directly and indirectly, at said points, or competition with railroad lines or between markets or products reduced the rates for shipment of oil to these points to the regular rates of shipment of oil in tank cars.

“(7.) Defendant admits that since April 5, 1887, it has charged for the transportation of oils from Cincinnati and from Louisville to Birmingham, Ala., Calera, Ala., Montgomery, Ala., and Selma, Ala., the same freight rate in all cases to each of said points, and that the distance from Cincinnati and Louisville by its road is to Calera 33 miles greater than to Birmingham, and to Montgomery is 63 miles greater than to Calera, and that oils transported over its lines of road from Cincinnati or Louisville to Montgomery are carried through Birmingham and Calera, but not through Selma, nor is Selma on defendant's lines of railroad; but said rates were not made nor are they controlled by this defendant. The same are fixed and regulated by the competition with water-ways and railroad lines over which defendant had and has no control, and are in and of themselves fair, just, and reasonable.

“For answer to the fourth charge made in complainant's bill and the specifications thereunder defendant—

“(1.) Denies that it has since April 5, 1887, charged or received for the transportation by it of such oils from Cincinnati or from Louisville, to points reached by its lines of railroad in states other than Ohio and Kentucky, a greater compensation in the aggregate for a shorter than a longer distance on the same line in the same direction, where the shorter was included within the longer distance, and whose

transportation being under substantially the same or similar circumstances and conditions.

“(2.) Defendant admits that the charges made by it for shipments of oil from Cincinnati and from Louisville to the various points set out in complainant's bill under this charge, and the distance to each of said points from Cincinnati and Louisville, respectively, is as given by complainant in its first and second specifications under the fourth charge in his bill, with the exception that the rate from Cincinnati to New Orleans should be 34 cents per 100 pounds and to Mobile the same, and the distance from Louisville to Mobile is 670 miles, and the rates should be from Louisville to New Orleans, 30 cents per 100 pounds, to Birmingham 45 7-10, and to Mobile 30 cents, but defendant says that said respective shipments to said several points were made under the very dissimilar circumstances and conditions as aforesaid, justifying and authorizing, as it believes, the different rates charged to the different places as aforesaid.

“(3.) Defendant denies that any of the alleged discriminations against complainant, or the alleged unreasonably high and unjust charges against him set out in his bill of complaint, have had any effect or were designed to affect or to give to said Standard Oil Company a monopoly of the traffic in such oils at the points or any points reached by its lines of railroad, or to exclude complainant's products from nearly all or any of aforesaid points, and it denies that such alleged discriminations or charges, or both, have been made by defendant at the dictation of the Standard Oil Company, and it denies that by reason of such alleged discriminations or such alleged unjust and unreasonably high charges, or both, complainant has been injured in his business, or that thereby he has lost profits that he would otherwise have realized.

“Whether complainant in all other respects than for said transportation during all or any of the time since April 5, 1887, has had ample facilities or what facilities, it has had for the transaction of a large or a profitable business in the sale of said oils in said markets, or that but for said alleged unjust and unreasonable charges and alleged unjust discriminations complainant would have prosecuted such with profit to

himself, defendant does not know and cannot state from its belief or otherwise."

All the other petitions were filed simultaneously with the one above mentioned—that is to say, July 22, 1887.

The pleadings in the other cases it is deemed sufficient to present in brief synopsis.

The petition against the St. Louis, Iron Mountain and Southern Railway charges that defendant violates the Act to Regulate Commerce—

I. By making charges for services to be rendered in the transportation of petroleum oils from St. Louis, Mo., to points on its line in the State of Arkansas which in themselves are unreasonably high.

II. By having, ever since April 5, 1887, charged complainant for services to be rendered by defendant in the transportation of such oils for complainant from St. Louis, Mo., to points in other states a greater compensation than it has charged the Waters-Pierce Oil Company of Missouri for like and contemporaneous services.

III. By having, since April 5, 1887, in its charges for the transportation of such oils, uniformly given undue and unreasonable preferences and advantages to said Waters-Pierce Oil Company of Missouri, and subjected complainant to undue and unreasonable prejudice and disadvantage.

The answer of this defendant meets the charges with full and specific denial.

In the case against the Mobile and Ohio Railroad Company the issue was so far narrowed by a stipulation of the parties hereinafter given as to render unnecessary any statement of the pleadings in this place.

In the case against the Cincinnati, New Orleans and Texas Pacific Railway Company the charges are that defendant has violated the provisions of the Act to Regulate Commerce—

I. By making charges for services to be rendered in the

transportation of petroleum oil from Cincinnati, Ohio, to points on its road in other states than Ohio which in themselves were unjust and unreasonably high.

II. By charging complainant for services to be rendered in the transportation of petroleum oil a greater compensation than it charged the Standard Oil Company of Kentucky for like and contemporaneous services.

III. By having in its rates charged for services rendered and to be rendered for the transportation of said oils for complainant and said Standard Oil Company of Kentucky, uniformly made and given undue and unreasonable preferences and advantages to said Standard Oil Company, and subjected complainant to undue and unreasonable prejudice and disadvantage.

The answer meets the charges with a full and specific denial.

The petition against the Cincinnati, New Orleans and Texas Pacific Railway Company, joined with the Alabama Great Southern Railroad Company, charges a violation of the said Act to Regulate Commerce—

I. By making charges for services to be rendered in the transportation of petroleum oil in themselves unjust and unreasonably high.

II. By having in the rates charged for services rendered and to be rendered in the transportation of petroleum oil for complainant and the Standard Oil Company of Kentucky, respectively, uniformly made and given undue and unreasonable preference and advantage to said Standard Oil Company and subjected complainant to undue and unreasonable prejudice and disadvantage.

III. By having charged for the transportation of petroleum oil from Cincinnati to points reached by defendants' roads a greater compensation in the aggregate for a shorter than for a longer distance over the same line in the same direction, the shorter being included in the longer distance, and

the transportation being under substantially the same circumstances and conditions.

Defendants meet the first and second charges by denial, and they also deny that since the expiration of the order of relief made on their behalf on the 19th day of April, 1887, they have made the greater charge for the shorter haul of the same property in the same direction, the shorter being included in the greater distance.

The petition against the Mississippi and Tennessee Railroad Company charges violation of the Act to Regulate Commerce by making charges for the transportation of petroleum oils from Memphis, Tenn., to Grenada, Miss., which are in themselves unreasonably high.

The answer justifies the charges.

The petition against the Newport News and Mississippi Valley Company and the Louisville, New Orleans and Texas Railway Company charges violation of the Act to Regulate Commerce :

I. In making charges for services rendered and to be rendered by defendants in the transportation of petroleum oils from Louisville, Ky., to Vicksburg, New Orleans, and other points which in themselves are unjust and unreasonably high.

II. By having uniformly since April 5, 1887, made and given undue and unreasonable preference and advantage to the Standard Oil Company of Kentucky, and subjected complainant to undue and unreasonable preference and disadvantage.

The defendants answer separately with specific denial.

The petition against the Newport News and Mississippi Valley Company and the Illinois Central Railroad Company charges a violation of the Act to Regulate Commerce—

I. By making charges for services rendered and to be rendered by defendants in the transportation of petroleum oil from Louisville, Ky., and points on their lines in other States which were in themselves unjust and unreasonably high.

II. By having in the rates charged by them for services rendered and to be rendered for complainant and for the Standard Oil Company of Kentucky uniformly made and given undue and unreasonable preference and advantage to said Standard Oil Company and subjected the complainant to undue and unreasonable prejudice and disadvantage.

The charges are fully met and denied by the answers.

The petition against the Illinois Central Railroad Company charges a violation of said Act to Regulate Commerce :

I. By making charges for services to be rendered in the transportation of petroleum oils from Cairo, in the State of Illinois, to points on its line of railroad in other States, which were in themselves unjust and unreasonably high.

II. By having, since July 9, 1887, charged and received for the transportation of petroleum oils from Cairo, Ill., to points reached by defendant's line of railroad in other States a greater compensation in the aggregate for a shorter than for a longer distance over the same line in the same direction, the shorter being included in the longer distance, and the transportation being under substantially the same circumstances and conditions.

The answer denies the first charge, and denies that the greater charges made for shorter than for longer hauls over the same line in the same direction are made under substantially similar circumstances and conditions.

Such were the issues made in the several cases.

The testimony upon which the cases have been submitted was taken in the main on oral examination of witnesses at the public sessions of the Commission, and the fullest opportunity was given for bringing out all the facts. The officers of the defendant companies connected with the freight departments of their roads, respectively, were examined, and the workings of the roads, so far as concerns this particular article of traffic were fully gone into, with the purpose on the part of the Commission to ascertain, if possible, not only whether any of the defendants had been guilty of unlawful discrimination against the complainant in the particulars

charged, but also whether the general course of the defendants in respect to the transportation of oil was relatively fair and just as between different shippers, and also as between the defendants and the general public.

The case of two of the defendants was, however, so different as to make them stand altogether apart from the main contest which was made by the others and to which the evidence was directed. It will, therefore, be most convenient to say in respect to them, in this place, all that we think there is occasion to say at this time, and afterwards to dispose of the others together.

In the case of the Mobile and Ohio Railroad Co. counsel for the respective parties have signed and filed the following paper:

"It is hereby understood and agreed by and between George Rice, complainant, and The Mobile and Ohio Railroad Company, defendant, in the above-entitled cause, that the complainant makes no objection to the rates of the defendant for transporting coal oil over its line of railroad as specified and shown in the third paragraph of the answer of the defendant to the petition of the complainant, except that said specification of rates shows that the defendant charges less for the transportation of oil from Cairo, Ill., to Mobile, Ala., than it does to points between Mobile, Ala., and Cairo, Ill.

"It is further understood and agreed that the defendants admits that its rates for the transportation of oil over its lines from Cairo, Ill., to Mobile, Ala., are less than the rate for like transportation of oil from Cairo, Ill., to points between Cairo, Ill., and Mobile, Ala.

"It is further understood and agreed that the defendant claims that the rate for the transportation of coal oil to Mobile, Ala., is fixed by water competition in connection with the short rail haul from New Orleans, La.

"It is further understood and agreed that the defendant claims that it is authorized to make the less charge for transporting oil in cases like Mobile, Ala., by the terms of the provisions of the fourth section of the Interstate Commerce Act."

The question which this paper undertakes to submit to our decision concerns other carriers and their customers quite as much as it does these parties, and a decision upon it would be far reaching in its consequences. This fact of itself would be ample reason why we should proceed cautiously in any consideration we should give it, and why we should require from a party raising it a very full presentation of such facts as would have legitimate bearing upon it.

A full presentation was not made on the hearing; the matter received very little attention and the facts were very imperfectly brought out. We could not intelligently dispose of the question on the facts now in proof, and it would be unjust to parties not now before us to make any attempt to do so. Under the circumstances, therefore, we shall make no order in this case, leaving the parties to bring the subject to our attention hereafter as they may think they have occasion. This disposition of the case for the time being decides nothing and concludes no one.

What is said on this subject is equally applicable to each of the other causes in which a violation of the long-and-short-haul rule of the fourth section of the act was charged. In none of the cases was special attention given to this feature of the controversy on the hearing, or any such examination of the facts gone into as would assist the Commission to safe judgments. Other charges were contested sharply and persistently, but this particular charge was scarcely noticed. Under such circumstances, if we were to pass judgment upon it, it would be necessary to institute further inquiries and make investigations on our own behalf; and this we think uncalled for in this controversy at this time. If a decision upon it is deemed important it may be assumed the parties, when it suits their convenience, will renew the subject, and present the considerations which bear upon it more fully.

The other of the two cases mentioned is that of the Mississippi and Tennessee Railroad Company, in which the only matter put in issue was whether the rates charged upon barrel oil from Memphis, Tenn., to Grenada, Miss., are reasonable. The shipments made over defendant's road are very few, and have been mostly made by others than complainant.

It does not appear that others are complaining. Upon the question of reasonableness the case is almost entirely without proof. Complainant relies upon the three facts that the rates are higher than generally prevail elsewhere, that they were formerly lower on this road, and that the defendant now carries the same commodity to points beyond Grenada at lower rates. The first two grounds of objection are not very conclusive. It is probable that defendant could not support a useful existence if it were compelled to measure its charges by those made by carriers whose lines command a heavier and more steady business. It is also not unlikely that this defendant at times has made rates it could not abide by permanently without bankruptcy. Most of the railroad companies of the country at some time or other have done so.

The third ground presents the same question which, in the case of the Mobile and Ohio Railroad Company, we declined to decide without some showing to enable us to see how the decision would affect the railroad business of the section. We are absolutely without any such showing in this case, and we think it entirely reasonable and proper, therefore, to decline to make any order.

We now proceed to dispose of the cases of the other defendants, and in doing so it is to be understood that when the term defendants is made use of it applies to those only whose cases are under consideration, and does not include the Mobile and Ohio and the Mississippi and Tennessee Railroad Companies, or either of them.

From the evidence it appears—and we find the fact to be—that there are two general methods for the transportation of petroleum oil and its products by rail, the one being in barrels holding an average of fifty gallons, and the other being in large iron tanks which are permanently fixed upon flat cars so as to constitute a part of the cars themselves. Some oil is carried in cans also, but that method does not come in question in these cases. The tanks vary greatly in size, some holding not more than three thousand gallons, or sixty barrels, while others hold twice that quantity. The refined oil, which is the kind that constitutes the subject of controversy in these cases, weighs six and a half pounds to the gal-

lon; the barrels in which the oil is shipped weigh about seventy-five pounds each, and a barrel with its contents about four hundred pounds. The tank cars which are sent into the territory in which the defendants operate are all either owned by the shippers themselves or are procured by them from some other source than the railroad companies, the latter never having supplied themselves with rollingstock for the purposes of this traffic. The Louisville and Nashville Railroad Company and the Cincinnati, New Orleans and Texas Pacific Railway Company are severally owners of the trucks and bodies of a few tank cars, but even of these the tanks are owned by the Standard Oil Company of Kentucky, so that they are not offered for use to shippers in general.

In the rate sheets which are published by the defendant, rates are named for the transportation of oil in barrels and oil in tanks; the latter, however, not to all points, but in general only to the points at which preparations have been made by a shipper to receive and store the oil shipped by that method. In some cases rates are named to points where no such preparations are made; the reason for which, if there is any, has not been very clearly explained to us. Generally the rate when the transportation is in tanks is by the car, but where it is in barrels it is by the barrel, in car-load lots, or by the hundred pounds. None of the rate sheets of the defendant which were put in evidence notified the shipper that the carrier was not prepared to furnish rollingstock for transporting the oil in either mode, a reasonable inference from the rate sheet not otherwise explained would be that it was. Thus the Newport News and Mississippi Valley Company, by tariff D 377, gives rates as follows: Louisville, Ky., to Memphis, Tenn., coal oil, car-load, in barrels, 45c.; coal oil in tanks per tank car, \$25.

If, however, the owner of oil at Louisville should desire to send a consignment of oil in tanks to Memphis, and should apply to have cars furnished him for the purpose, he would be told at once that the company did not supply tank cars its customers; that if they desired to avail themselves of this method of transportation they must not only pay the rates prescribed, but they must also furnish the company with

This is obviously a most important qualification of the rate itself; and if the shipper must furnish the car at his own expense, the actual cost to him of the transportation will very much exceed the published rate. This, however, does not seem to be generally expected; on the contrary, there seems to be a general, though not a universal, understanding among railroad companies in the southwest, including the defendants, that the party furnishing a tank car shall be paid trackage for its use at the rate customary among railroad companies, namely, three-fourths of a cent a mile going and returning, with the privilege on the part of the railroad company of loading the car with return freight when any is offered, or is procurable.

One difficulty with this understanding is that it does not appear in the rate sheets. The sixth section of the Act to Regulate Commerce provides that "every common carrier subject to the provisions of this act shall print and keep for public inspection schedules showing the rates and fares and charges for the transportation of passengers and property which any such common carrier has established, and which are in force at the time upon its railroad, as defined by the first section of this act. The schedules printed as aforesaid by any such common carrier shall plainly state the places upon its railroad between which property and passengers will be carried, and shall contain the classification of freight in force upon such railroad, and shall also state separately the terminal charges, and any rules or regulations which in any wise change, affect, or determine any part of the aggregate of such aforesaid rates and fares and charges."

The purpose of this provision is very manifest and is well understood. It intends that every person desiring to avail himself of the facilities afforded by the railroads of the country should be enabled to tell for himself, without being under the necessity of calling in the aid of any railroad agent or other persons, what charges he must pay for the transportation of his person or his property, and also have in the published rate sheets an accurate test of the correctness of any exaction. The rate sheets introduced by the defendants in these cases can hardly be said to give this infor-

mation. They omit to give a rule, regulation, or understanding which has very important bearing on the rates, and they wholly omit to notify the owner of oil that the carriers making them do not furnish him with cars for one of the methods of transportation which in terms they offer to him. The rate sheets, therefore, require to be supplemented by other information, and it is from this fact that some part of the controversy between these parties has arisen.

It was said on the argument that the railroad companies were under obligation to furnish tanks no more than they were to furnish barrels; that tanks and barrels were only different kinds of caskets for holding the property which was to be conveyed, and it was matter of course that the shipper should furnish them for himself. This might be quite true if the tank, like the barrel, was received from the consignor and taken for delivery to the consignee, as packages usually are; but it is not. It is, on the other hand, a part of the car itself, as much as are the sides to an ordinary box car; it is provided only to hold the oil for transportation, while the barrel holds it both before and after shipment, as an article of merchandise, and is bought and sold with it. The shipper in barrels, it is quite true, is expected to deliver his merchandise in that form of package, and the rate bill informs him what he must pay upon it. The party proposing to ship in tanks does not receive from the rate sheets equivalent information; and if outside the rate sheets he learns that he must furnish the tank cars, he is still unapprised upon what terms this is to be done, and must seek the information from the officers or agents of the carrier.

But when he seeks this information he learns immediately that the matter is or may be the subject of private negotiation, and perhaps of different terms in different cases. Thus the evils at which this provision of the statute was aimed make their appearance immediately. He is not informed by the rate sheets what he will be charged for the service to be rendered him, and when he seeks the information he finds the terms are to be the subject of bargain; but a bargain implies a difference in terms in different cases. We are not to be understood as finding or as intimating an opinion that all

of these defendants have made different terms in different cases. The evidence as to the most of them has no tendency to establish against them such a charge. We say only that as they have not by their rate sheets bound themselves to any particular terms, the precise terms must be fixed in some other way. If any one carrier has a definite and uniform practice on the subject it will not be chargeable with discrimination while the practice is followed ; but uniformity of practice, while it shows correct motives, does not excuse a failure to give full information to the public in the rate sheets.

In the case of the Louisville and Nashville Railroad Company, however, it clearly appears that the private arrangements made for the use of cars have been different in the case of different shippers, and that it has no definite rule on the subject. The general freight agent of that road, being on the stand, was asked :

“ What do you charge for bringing these empty tank cars back from the south ? What would you charge Mr. Rice ? ”

Answer. “ Not less than a cent and a half ; we might charge three cents. If he wished to make arrangements with us now we should probably charge him a cent and a half, or might charge him three cents. It would depend on the section of the country to which he wanted to ship. ”

A little further on he is asked by a member of the Commission :

“ When these tank cars go south do you take the risk of getting a load back, or do you perform your contract when you take the oil to the place of destination, leaving the car there ? I want to know what your contract covers. You advertise to take the oil for so much. Does that mean simply delivering the oil at the place of destination, leaving the other party to get the car back ? ”

Answer. “ Our rate on oil applies only to the shipment of that oil, but we are influenced in making that rate by the prospect of return loads. ”

Question. “ If you get no return load is the expense of hauling the empty car back, if you choose to charge it, charged to the shipper ? ”

Answer. "If there were not generally return loads we would then insist upon getting pay for hauling the car back?"

Question. "You charge so much for hauling oil from Louisville to Montgomery, and when you deliver it there that completes your contract, and you leave the car there if you please?"

Answer. "Yes, sir."

Question. "And are not under obligation to bring the car back?"

Answer. "No, sir."

Question. "And then the bringing the car back is matter of contract between you and the shipper?"

Answer. "Yes; but if you will let me explain—a great portion of the return loads for these cars is furnished by the shippers of coal oil. The shipments of cotton-seed oil are not furnished by the shippers of coal oil, but the cars that carry down the petroleum oil by arrangement with parties down there have the tanks sent back with return loads of cotton-seed oil. I know of one case in which a firm in Louisville receiving cotton-seed oil made an arrangement with the owners of forty-six cars to return them filled with cotton-seed oil."

Question. "Suppose a man comes to you to make a contract with you for transporting oil to Mobile or Montgomery, is your contract performed when you reach the destination, and may you leave the car there?"

Answer. "Yes; we have then performed our contract and may leave the car there."

Question. "And in respect to bringing that car back, it would be matter of arrangement or contract between you and him?"

Answer. "Yes, sir; a separate transaction."

Question by counsel. "As a matter of fact, whenever they cannot get a return load you do haul them back free, do you not?"

Answer. "We have hauled a few free."

Question. "Have you not hauled all that did not contain a return load free?"

Answer. "We have hauled free all that did come back empty for some time."

Question. "And in every instance where there is no return load you haul back the empty car free?"

Answer. "Yes; but those are a small percentage."

There is also evidence that two at least of the other defendants are without a uniform practice on this subject, and the general freight agent of another is not able to say how it is with his company; but whether the other defendants do or do not observe uniformity in their dealings with this subject, it is plain that, in failing to give full information by publication, abundant opportunity for discriminations is left to agents, and it will be surprising if these are not sometimes availed of, when, perhaps, the agents suppose they are acting entirely within the scope of their general authority to make contracts.

We are now to see whether these defendants or any of them have been guilty of the unjust discrimination and of the making of excessive rates which are charged against them.

The unjust discrimination in the case of transportation east of the Mississippi is supposed to have had for its object the giving of an advantage to the Standard Oil Company of Kentucky, and that in the case of transportation west of the Mississippi to have been designed to favor the Waters-Pierce Oil Company of St. Louis. Both these companies are spoken of as Standard Oil companies. It was testified before us that a controlling interest in each of them is held by the Standard Oil Trust. This evidence was given by one of the trustees of the Trust, who also testified that the capital represented by the Trust was about ninety million dollars. Another witness, who assumed to have some knowledge on the subject, estimated the actual cash value of this capital at one hundred and fifty millions. Whether the one estimate or the other is the correct one, this is an immense property to be under the control of eight trustees, as this appears to be. It represents a great number of prosperous establishments in

different parts of the country, and it gives an immense power which is capable of being so employed as to put all competitors at a great and perhaps ruinous disadvantage. It is of the utmost importance, therefore, that the several railroad companies which are patronized by them should not only abstain from granting to those who wield this power any special and peculiar privileges, but should as far as possible avoid giving cause for suspicion that they are so doing.

It is but just to the defendants in these cases to say that no evidence was giving tending to show that they had favored the Standard Oil Companies specially as distinguished from other companies, firms, or individuals who shipped their oil in tank cars; for the discriminations which appeared on the hearing, and which were relied upon as establishing the charges made in the complaints, operated not in favor of the Standard Oil Companies alone, but of all shippers in tanks. The Standard Oil Companies, however, were shown to be much the largest shippers of oil in this mode, and therefore would be most largely benefited by discriminations against the shippers in barrels.

In making proof of discriminations charged, reliance was had in part on the great differences shown by the published rate sheets between the charges made for the transportation in tanks and in barrels; the latter being almost invariably very much higher. This it was claimed was in itself illegal, not being justified by any difference in cost or by other facts or circumstances. The fact that a uniform charge was made for the transportation of tank cars, regardless of capacity, was also relied upon as proof tending in the same direction.

In turning our attention to this question of discrimination we are at the outset confronted with a jurisdictional objection which is interposed on behalf of one of the defendants, and which, if valid on its behalf, is equally a protection to all the others, even though they do not themselves advance it in argument. The objection is one which goes to the lawful authority of the Commission to make inquiry into the relative equality and justice of the rates charged for the transportation of oil in barrels and oil in tanks, respectively. The

point is so important that it is deemed proper to state it in the exact words of counsel.

“This case,” it is said, “involves the question whether the Act to Regulate Commerce confers upon this Commission jurisdiction to inquire into the relative reasonableness of rates which a common carrier may have adopted in good faith for transporting the same traffic in different modes.

“The question assumes that the carrier, in adopting the different modes of transportation and in fixing the different rates therefor, has not acted capriciously or maliciously, but in good faith, according to its best judgment, with a view to subserve what it regards its best interests.

“The question also assumes that the carrier offers the different modes of transportation, with their corresponding rates, equally and impartially to all shippers alike; that it is possible for the class of persons usually engaged in that particular traffic to conform to either of the modes of transportation, and that the highest rate charged for either mode of transportation is ‘reasonable in and of itself.’

“By the expression ‘reasonable in and of itself’ is meant that the highest rate charged by the carrier is no more than a reasonable compensation for transporting the traffic in the mode for which that rate is charged, and that the only ground for claiming it to be unreasonable is that it is higher than another rate which is charged by the same carrier for transporting the same traffic at the same time between the same points, but by a different mode of transportation.

“It will be conceded that this Commission was created by the Act of Congress ‘to Regulate Commerce;’ that it has no jurisdiction except such as is conferred by that act, and that its jurisdiction, so far as this question is concerned, must be found in the first, second or third sections of said act, or that the jurisdiction does not exist at all.

“The first section enacts that ‘all charges made for any service * * * shall be reasonable and just.’

“This section does no more than announce a well-settled rule of the common law; but as the United States, regarded as a Government distinct from the States, had no common law of its own, it required an Act of Congress to adopt the

common-law principle into the law of the Union regulating interstate commerce.

“But while the common law did require that all the charges of a common carrier should be ‘reasonable,’ it did not require that they should be *equal*, even where the service was the same, nor that they should be *proportioned* to the service, where the service differed in different cases.

“At common law, if the rate charged A was *reasonable in and of itself* he could not complain, even though the carrier might render precisely the same service to B free of any charge whatever; and it was to remedy this defect of the common law that the English Parliament passed the act of 8 and 9 Vict., chapter 20, known as the Railway Clauses Consolidation Act of 1845.

“The word ‘reasonable,’ as used in the *first* section of the ‘Act to Regulate Commerce,’ is used in the same sense in which it was used at common law, viz., reasonable ‘in and of itself,’ without regard to whether a low rate was or was not charged for the same or a similar service.

“I concede that the Commission may, under the *first* section, determine whether the rate upon coal oil in barrels is *reasonable* or right ‘in and of itself,’ viz., *whether it is a fair compensation for that particular mode of carrying coal oil.*

“But I deny that the Commission can, under the *first* section, lawfully declare the rate upon barrels to be unreasonable *merely because a lower rate is charged upon tanks*, even though the Commission should find that the difference in rates is greater than the difference in the cost, &c., of the two modes of transportation.

“I admit that where different rates are charged the Commission may, under the *second* section of the act, determine whether the rates are charged for services which are ‘like and contemporaneous,’ and whether they are rendered under substantially similar circumstances and conditions, but I deny that the Commission has any power under the *first* section to declare that a rate is not *reasonable* merely because it is higher than another rate charged by the same carrier for a different service, even though both services may be rendered under substantially similar circumstances and conditions.

“I also admit that where different rates are charged, the Commission may, under the *third* section, determine whether such difference in rates ‘makes or gives any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic,’ but I deny that the Commission has any power, under the *first* section, to declare that a rate open to all persons is not *reasonable* merely because it gives an advantage to the person who accepts it over another person who voluntarily selects a different mode of transportation for which a higher rate is charged.

“A mere difference of rates may in many cases constitute a violation of sections 2 and 3, but it can never constitute a violation of section 1 of the act.

“It matters not how great the difference between two rates may be, it can never amount to a violation of section 1 if the higher rate is ‘*in and of itself reasonable and just*,’—*i. e.*, only a fair compensation for the service for which that particular rate is charged.

“The fact that sections 2 and 3 of the act give to the Commission ample powers in regard to *differences* in rates is strongly persuasive that section 1 was intended to be confined to the reasonableness of rates.”

In support of these views cases are cited, and particularly *Nicholson v. Great Western R. R. Co.*, 1 Nev. & Mac., 148, and *Great Western R. R. Co. v. McCarthy*, 29 Amer. and Eng. R. R. Cas., 87.

The question thus presented is one of considerable importance, and it is forcibly and ingeniously argued in an elaborate brief. It is seen that it assumes at the outset “that the different modes of transportation with the corresponding rates are offered equally and impartially to all shippers alike; that it is possible for the class of persons usually engaged in that particular traffic to conform to either of the modes of transportation, and that the highest rate charged for either mode of transportation is reasonable in and of itself.”

This assumption makes the resort to the one method of transportation rather than the other a matter purely of voluntary choice on the part of the shipper, and if the argu-

ment is correct in further assuming that the two methods are equally open to all who usually engage in the business, it may justly be urged with very great force that the party resorting to the one is by the choice itself precluded from raising any question of relative reasonableness by comparing the rates he chose with the lesser rates he might have chosen, but did not. It is conceded in the statement of the question that no two kinds of traffic are in question, but only one kind of traffic conducted in different ways. The merchandise in question is a single or identical article, and the purpose of the transportation is to deliver the commodity to consignees whose competition in the sale of it will be wholly unaffected by the method in which it has been brought to them. Whether it has come in barrels or in tanks is immaterial when the owner offers it in market; he can place no higher price upon it in the one case than the other. It is therefore obvious that if a heavier burden is laid upon one method of transportation than is imposed upon the other, it must under ordinary circumstances, be impossible for those who adopt the first method to succeed in the competition when they meet the others in the same markets. Their interest, therefore, in the charges which are made to their competitors is obvious. Unreasonably low charges to their competitors would be as fatal to their success as unreasonably high charges to themselves.

The most important question that arises upon the assumptions made as the basis for this argument is, whether there are in fact two different modes of transportation which are offered, with their corresponding rates, equally and impartially to all shippers alike, and which it is possible for the class of persons usually engaged in the traffic freely to choose between. If no such offer is in fact made we have no occasion to follow the reasoning of the argument. §

Unless we wholly misapprehend the real situation, when the rate sheets of these defendants are presented to the class of persons usually engaged in the traffic, the assumption that two different modes of transportation are offered to them equally and impartially is baseless. No one of these defendants offers two modes of transportation in the same sense

in which it offers its facilities for transportation to shippers of other commodities. Each of them supplies rolling stock for one method only, and that one is shown to be the method on which, by their rate sheets, the heaviest burdens are imposed. No such choice is given to adopt the other mode as would be implied from the language used in stating the question; on the contrary, an applicant for that method of transportation would be told he must furnish his own rolling stock; and this means very much more than might seem to be indicated by this statement; it means, if he would make his business a success, that he shall supply himself with a very considerable number of cars, costing perhaps \$700 each, and that he shall also have stationary tanks at the points to which his shipments are to be made. The cost of the necessary terminal facilities which he must supply for himself we have no means from the evidence in these cases of comparing with the cost of making provision for the storage of barrels by one who adopts that method. It was testified that the terminal facilities of the Standard Oil Company of Kentucky at Selma, Ala., cost about two thousand dollars, and at New Orleans about twenty thousand. The vice-president of the Waters-Pierce Oil Company estimates the average cost of putting up stationary tanks to accommodate tank shipments, including side tracks, etc., to be from \$1,000 to \$50,000, according to the requirements of the station, except at St. Louis, where he estimates it at \$250,000. It is obvious, we think, from the facts stated, that instead of the defendants offering two methods of transportation which are open to the acceptance of all, they offer only one which is so open. The other is offered on such terms that it can by possibility be accepted only by parties who can control a considerable capital, and who will supply for themselves an important part of the means of transportation, and also supply terminal facilities. The man of small means who adopts the method of transportation in barrels cannot be said to do so of choice when the failure of the carrier to supply for the other the customary means of transportation compels him to do so.

It was said on the argument that this compulsion was not the fault of the carriers, since it resulted from the man's own

circumstances ; and it was very justly remarked that it is not the business of carriers to relieve against inequalities in the pecuniary condition of those who give them business. This is perfectly true. If one man can pay the extra charge which is made for being transported in a palace car and chooses to do so, the fact constitutes no ground for complaint on the part of another man who, by reason of want of means to pay for the like accommodation, is compelled to ride in the common car. When the carrier provides accommodations for all and offers them impartially, he stands blameless as to those whose circumstances preclude acceptance ; but that is not the case we have before us. The carriers do not provide accommodations for the two methods of transportation ; they provide them for one method only, and in doing so they fall short of what, in respect to all other kinds of traffic, is practically the universal custom. It is from this fact that the oppression complained of in these cases springs. The carriers offer no choice to their customers ; they fail to provide for the general use of all who may desire it the rolling-stock for transporting in the way which they say is most profitable to themselves, this very large traffic, but they give to the dealers who will perform this duty for them rates so favorable as to put those who adopt the only method the carriers provide at such disadvantage as to preclude successful competition.

It does not seem to us either just or plausible to say under such circumstances that the person whose oil is carried in barrels has voluntarily chosen that method, and has no concern with the charges imposed on his competitor who adopted the other. He is, on the contrary, vitally concerned with those charges, and if his own are not to be gauged in some degree by them, he may be ruined in his business without redress, even though the charges he pays, when considered by themselves, may seem not unreasonable.

But it is further seen that the whole argument on this branch of the case is rested by counsel on the proposition that the charges made on transportation of oil in barrels are reasonable in and of themselves ; if they are found not to be,

the jurisdictional difficulty which is suggested need not further occupy our attention.

It is to be regretted that we are not more clearly shown in the argument presented on this point how we may determine when rates are, and when they are not, in and of themselves, reasonable. When a limitation of power depends upon facts there ought to be no question what facts are to be considered, since otherwise the limitation is likely to be the subject of continual dispute, and may possibly be exceeded, even when the intention is to observe it with due care: and especially when such a limitation depends upon a pecuniary charge being reasonable or the reverse, the tests of what is reasonable ought to be such as not only can be easily applied, but as in themselves are open to no controversy.

Counsel has defined the expression "reasonable in and of itself" to mean "a reasonable compensation for transporting the traffic in the mode for which the rate is charged;" but the definition throws little or no light upon the question how this reasonable compensation is to be measured and determined.

It is sometimes contended, though not by the carriers themselves, that we may measure the reasonableness of charges by the cost of transportation. These defendants will not contend that that is a proper test, for their whole practice is against measuring their charges by the cost. It may cost no more to carry a box of silk weighing 100 pounds than a bale of refuse rags of like weight, but the charge will, perhaps, be several times as great, and the carrier justifies the discrimination by showing that equal rates on both would put transportation of the less valuable article out of the question. Like discriminations are made everywhere; property is classified with a purpose, among other things, to make the most valuable kinds pay most largely for the service performed. This is a wise, if not a necessary policy, and as the railroads adopt it universally they are fairly estopped from claiming that from cost alone it can be determined whether charges are in and of themselves reasonable.

A better test, it is sometimes said, may be found in the

value of the service to the owner of the property carried. Some articles must be carried at low rates because the traffic will bear no higher, and therefore the low rates are all the service is worth. Other articles, though it may cost no more to carry them, may justly be charged much higher rates. The effect of transportation upon market value is taken into account by carriers in making rates, and it is insisted on their behalf that this is neither unreasonable nor unjust; but it is very obvious that if rates as to their reasonableness are to be measured by the standard of what the service is worth to the owner of the property, it is impossible, when considering the value of the service in transporting a particular kind of property by one method, to leave out of view the charges imposed for transporting the like property by another method, which for any reason is limited to a part only of the carrier's customers. Whether the service to the owner in carrying by one method shall be worth much, or be of no value whatever, may depend altogether on the charges which are made to others for carrying by the other method.

But the proposition that we may determine absolutely what rates are in and of themselves reasonable on a consideration exclusively of the particular traffic by itself, is antagonistic to the whole railroad practice of the country, and would not for a moment be accepted and acted upon by any committee of rate-makers. Rates are never made in that way; but instead thereof property is classified, and the whole field is surveyed with a view to the establishment of such charges as shall be relatively proper and just, as near as circumstances will admit of their being made so. There is not a railroad company in the country with a business of any considerable magnitude that could justify each of its rates by itself without taking its general traffic into account, or without its being allowed to show how excessive competition at one point or in one traffic had forced higher rates elsewhere that might otherwise be reasonable, or how, on the other hand, good returns from one traffic which the traffic can bear without being oppressed, permit of very low rates to some other traffic which otherwise might be unprofitable. Thus the railroad practice appears to be to treat those rates as reasonable in

and of themselves which, on a consideration of the whole field of operations, it is seen that the carrier can afford to accept, and which at the same time the owner of the property can afford to pay, because they are not in excess of what the service is worth to him; but in fixing upon rates it is specially important, if not absolutely necessary, to have something like uniformity in the rates upon articles which are of like kind and value and which supply the same demand, since otherwise those which are made to bear the heavier rate would be driven out of the market.

This being the method whereby reasonable rates are customarily determined, we have no occasion to discuss the soundness of the position taken by counsel, that if a rate is reasonable in and of itself the Commission cannot require it to be changed. We do not question the proposition of counsel that Congress has not conferred upon the Commission the authority to force a change of reasonable rates. By the Act to Regulate Commerce the Federal Legislature intended to be just to the carriers as well as to do justice to the general public; and we agree that it has not authorized their rates to be changed against their will when in themselves the rates are just and reasonable. If, therefore, it shall be found that the charges made by these defendants for the transportation of oil in barrels are in themselves just and reasonable no order will be made by this Commission for their alteration; but in determining their reasonableness we shall consider ourselves not only at liberty but absolutely required to keep in view the disparity which is shown to exist between them and the rates which the same companies charge upon the same article of merchandise, when they receive and transport it in cars furnished by shippers themselves. That disparity has an inevitable and very important bearing upon the question of reasonableness; *prima facie* it is unjust, because it is oppressive, and the defendants are fairly called upon to exhibit good reasons for it.

This view of the case also renders it unnecessary for us, in considering the evidence adduced in support of the complaints, to distinguish as between that which is offered to

prove excessive rates on barrel shipments and that which is given to show unjust discrimination. Whatever evidence tends to show that the rates on barrel shipments are unreasonable because too greatly in excess of the charges made on tank shipments, will also in like degree tend to show that in making rates on barrel and tank shipments, respectively, the defendants were guilty of unjust discrimination. This is self-evident.

On the hearing the defendants entered upon a justification of their rates, and it was planted by them on several distinct grounds. These we may summarize as follows:

I. Those who have their property sent in tanks furnish the rolling stock for the purpose, and save the carriers the necessity and the expense of supplying it.

II. This method of transportation exposes the carrier to less risks of losses by fire and of damage to other property transported by it.

III. It is more profitable to the carrier, because the probability of a return load is greater, and also because the load of a car may be greater, and the carrier neither loads nor unloads the property nor furnishes store room for it.

Each of these grounds of justification deserves and must receive some attention at our hands.

I. The fact that the owner supplies the rolling stock when his oil is shipped in tanks, in our opinion, is entitled to little weight when rates are under consideration. It is properly the business of railroad companies to supply to their customers suitable vehicles of transportation (*Railroad Co. v. Pratt*, 22 Wall., 123, 133) and then to offer their use to everybody impartially. If the varieties of traffic are such, and their requirements of rolling stock so numerous and diversified that this becomes impracticable or burdensome, so that the aid of their customers becomes essential or convenient, the supply obtained by their assistance cannot with any justice be utilized by the carrier in such manner as to establish

discriminations which would otherwise be inadmissible. The carrier has no right to hire rolling stock and then allow it to be used exclusively by one class of persons on such terms as will drive out of business those who are compelled to use its own rolling stock in a competitive traffic. This, however, is precisely what takes place in this traffic if the rates for the transportation in barrels are considerably in excess of those which are charged for the transportation in tanks. The tank cars which are furnished to the carrier by shippers, whether the use is paid for or not, ought properly to be held for the use of all; but if this is found impracticable, it is very certain and very obvious that proprietorship of the car for the use of which the carrier pays, as it generally does, can fairly entitle the owner to no special consideration in the making of rates. He has an advantage, arising from his ownership, in being able to control the use, but that circumstance can be no reason for extending to him exceptionable consideration which will make the advantage specially oppressive to competitors. It is, on the other hand, a very forcible reason why the carrier should see to it that its patrons who are forced to make use of such facilities as it provides for them shall not find its own want of proper rolling stock made a ground of discrimination against them. On this point the misapprehension of the situation is very apparent in some of the arguments which have been made for the defense. The complainant, it is said, asks the railroad companies to relieve him from the consequences of his own lack of capital to carry on his business to the best advantage. He cannot choose the best method, because that method requires a large outlay in capital. His competitor in business can choose it, and it is for that reason that complainant is driven out of the market. He must blame his want of capital, it is said, and not the railroad companies, for his failure.

A statement of the situation differing a little from this will more nearly present the actual facts. The railroad company not having supplied itself with the necessary rolling stock to enable one branch of its traffic to be carried on in the way most advantageous to those who engage in it, suffers parties

who have the capital which will enable them to supply the defect to put cars of their own upon the road, for the use of which it pays, and at the same time gives to such parties the exclusive use of what they supply, and also such preferential rates on the merchandise carried for them as will put successful competition quite out of the question. It is not the lack of capital to carry on the business that then proves fatal, but it is the lack of capital, in addition to what is needed in the business, to supply rolling stock to the railroad company for his use. It would be the height of injustice for the carrier to make such a lack a ground for discrimination in rates, and then to say that the party suffering from it had no reason for complaint since the rates which are named are offered to all. The offer is exclusive in fact, whatever it may be in terms or in theory.

If a carrier of passengers were to make a uniform rate of three cents a mile to all who rode in the cars it provided, but, being deficient in rolling stock, were to allow owners of private cars to fill them with passengers at two cents a mile and be paid for the use of the cars in addition, we should not expect any one to attempt a defense of the discrimination based upon the ground that the rates were equally open to all, and that if one, by reason of lack of capital to supply himself with a private car, was unable to take the benefit of the most favorable rate, he should blame his fortune for it, not the common carrier. The wrong in such a case would be as plain as it would be gross; but such a discrimination in the carriage of persons would be far less injurious than a similar discrimination in the transportation of property: the one would involve a small sum of money only; the other might be destructive to a business. We hold, therefore, that the fact that one consignor furnishes a car for hire to the railroad company for the transportation of his oil is no ground whatever for a discrimination in rates in his favor against another consignor who must ship in the cars the carrier supplies. It may be a reason for limiting to himself the use of the car he furnishes, but the discrimination cannot justly or lawfully go any further.

II. The fact that transportation in barrels exposes the car-

rier to more risks than does transportation in tanks seems to be most relied upon to support the discrimination made in rates, and it was very strongly urged on the argument. The risks are, *first*, of accidental fires in consequence of leakage from barrels, and *second*, of injury to other property arising from its being affected by petroleum odors. Considerable evidence was given to show that leakage from barrels was constant and in warm weather very great, and that trains and warehouses were specially exposed to accidental fires in consequence. On the other hand, there was evidence that the risks are greatest when the oil is transported in tanks; the greatest risks being from collisions, which might break up and empty the tanks and expose the whole vicinity, while barrels might for the most part or altogether escape breakage. Persons entitled to speak as experts differed very widely in their testimony on this point, but Mr. Brundred, the manager of the tank line which is operated on the Pennsylvania roads, and who testified to having kept careful statistics covering a considerable period of time, showed by these that the risks from either mode of transportation were small, but were least when the transportation was in barrels. Possibly his experience may have been somewhat exceptional; but we are not satisfied from the evidence that there is any such greater risk from fires when the oil is conveyed in barrels as can justify a difference in rates. The risk from injury to other property is something, but not serious. Oil in barrels is transported in cars which when not used for that purpose are employed in the transportation of live stock, lumber, iron ore, or other articles not subject to injury from the odors, and when taken in car-load lots is loaded and unloaded by the shipper elsewhere than in the company's warehouses. With proper care, therefore, injury to other property ought very seldom to happen.

III. The greater probability of finding return loads for the tanks is much relied on. The return loads are either turpentine or cotton-seed oil. The turpentine region is reached by some of the roads, but not by all; but on those same roads are lumber, iron, and other heavy articles to be transported

in the direction opposite to that in which the oil is taken, and which would constitute very suitable loading for the cars in which oil in barrels is carried southward. It is a very pregnant fact as bearing on relative rates in this region that Mr. Virgil Powers, the Commissioner of the Southern Railway and Steamship Association, and Mr. Charles A. Sindall, the Secretary, both of whom have had long experience in those or similar capacities, agree in opinion that oil in barrels ought to be transported as cheaply as the same quantity in tanks. This opinion would not have been given without good reason; and without doubt the probability of return loads for the tanks were taken into account. In the southwest cotton-seed oil mills may or may not be found at the points to which oil in tanks is taken. If they are not the tank must return empty or it must be sent elsewhere for a load. But we do not learn from any evidence given before us that the railroad company has any right, under its implied contract for the transportation of the petroleum oil, to send the tank cars to any other point for a load when it does not find one at the place of delivery. If there is any such right it must arise from some special contract or arrangement; and if any such exists the terms and particular privileges given are not disclosed in these cases; but when thus sent elsewhere it may or may not be the case that there is any considerable advantage in it, such as would be derived from taking up a load at the point of delivery of the petroleum oil and putting it down where the oil was received. The advantage in the latter case would be very great; in the former it might be trifling; but in all cases where cotton-seed oil is the return loading the advantage would seem to be reduced to a minimum by the very low charge which is made for the transportation of that commodity. This charge, for some reason not satisfactorily explained to the Commission, is made astonishingly low when compared with the charge made upon petroleum, although the cotton-seed oil is much the more valuable article. It is very manifest from the evidence that the cotton-seed oil traffic in itself is not one of much profit to these defendants.

The capacity of some of the tank cars is such that a larger

quantity of oil can be taken by them than in such cars as barrels are conveyed in. This, of course, is favorable to the carrier, and enables him to carry more cheaply in proportion to quantity; but a considerable proportion of the tanks are not of this great size, and the load they carry does not exceed the ordinary car-load in barrels. Moreover, it has been shown that heretofore the great size of some of the tanks has been ignored by some of these defendants altogether, and they have made no distinction in charge between carrying sixty barrels in a tank and carrying twice that quantity. They may, therefore, be gainers instead of losers by the establishment of a rule which measures their compensation for the service rendered by the tonnage carried, whether it be in the one mode or in the other.

We are entirely satisfied that this ought to be the rule. Barrel shipments in car-load lots, loaded by the consignor and to be unloaded by the consignee elsewhere than in the carrier's warehouse, if subjected to higher rates would be charged more than is either just or reasonable. We also think, and so find, that the great difference in rates shown in these cases to have been generally made as between barrel and tank shipments amounted to unjust discrimination as against the former. The rule should be to consider the tank a part of the car itself, and for the load carried in it the charge ought to be the same by the hundred pounds as is made on the transportation of barrels of oil in car-load lots in other cars. Even then the shipper in barrels is at some disadvantage, for he must pay freight on barrels as well as on oil; but this, as between him and the carrier, is not unjust.

We find, then, on a careful review of the testimony in this case and after full reflection, that no sufficient reason is shown to justify the defendants making a distinction in their charges as between the parties employing the two different modes of carriage. We hold that when transportation is in car-load lots the same charge by the hundred pounds should be made upon all consignments from and to the same points. Particular routes might be named on which it would be just

to allow the oil to be carried in tanks at a lower rate ; but on other routes the transportation in barrels might be most likely to insure return loads. There neither is nor can be any rule on that subject, and the attempt to consider each road of a system and each several feeder by itself, and to discriminate for each according to the probabilities of return loads, would be far more perplexing than useful, and would breed many vexatious controversies. The roads constituting the Southern Railway and Steamship Association submitted the subject to three arbitrators in 1886, and the arbitrators, by an award made October 27, 1886, decided as follows :

“The board decides and awards that, taking effect November 1, 1886, coal oil in barrels, in car-load quantities, be put in sixth class released, the same as coal oil in tank cars.”

By this award both methods of transportation were to be put, in respect to rates, on the same footing for the whole system ; the arbitrators apparently deeming it impracticable to make any difference from a consideration of the probabilities of return loads. We assent to this view because we think the attempt to take these probabilities into account would not be likely to have beneficial results.

This ruling concerns a traffic in which one method of transportation has no other or different effect upon the value of the article carried than has the other. The oil, when delivered, is of no higher value because of having been conveyed in barrels, and the owner has in no respect been supplied with superior accommodations or facilities which can be made the basis for an additional charge against him. The additional charge heretofore made has necessarily been grounded on something besides additional benefit to the party subjected to it.

This ruling does not preclude such allowance for the use of tank cars as is customary, provided it be reasonable ; but on the contrary, it assumes that such allowance will be made. But it should be made on some system, by some rule of uniformity, and the authority to make it must not, carelessly or otherwise, be made a means of discrimination.

It is now to be considered how far these parties, severally, are to be deemed guilty of unlawful discrimination in what they have done during the period covered by the complaint.

Upon this subject we have to say at the outset that, in our opinion, the mere fact that they have hitherto made a difference in rates as between the shipments in barrels and the shipments in tanks ought not of itself to be considered proof of unjust discrimination. There is room for great differences in opinion as to the relative rates which can justly and properly be charged, and a considerable difference might honestly be made in framing a rate sheet. There should be further proof than this mere difference to make out the unlawful discrimination as regards consignments made prior to the time of promulgating this opinion.

In the case of the Louisville and Nashville Railroad Company this additional proof is furnished in several ways:

One of the proofs is to be found in the making of the rate by the tank car regardless of weight or quantity. When one tank holds twice as much as another there can be no valid excuse for this; it necessarily makes the rates excessively low to the shipper in large tanks and specially oppressive to the shipper in barrels, when the largest tanks are made use of; but the wrong was emphasized in the case of this company by the public being led to suppose that when the contents of the car exceeded a certain quantity or weight an extra charge was made, when in fact this was never done. But proofs of intentional disregard of the rights of the complainant, or of such want of regard for them as is equivalent, are made very evident in the correspondence between himself and the agents of the company.

The general freight agent of the company testified that its freight rates on oil in tanks up to April 5, 1887, were made regardless of quantity; that they were then changed to rates by the hundred pounds, but on the 11th of May following the company again went back to tank-car rates irrespective of quantity. Fixing the rates in tank cars by the hundred pounds does not seem, however, to have meant much, for

there were some shipments within this period by the Standard Oil Company regardless of actual weight, and the witness testified that a tank would have been received as holding 20,000 pounds, though this was greatly below the average quantity carried in one. He testified further that the Southern Railway and Steamship classification as printed and as given out by his company has this note: "Coal oil or its products in tank cars must always be charged at actual weight;" but, though a member of that association, his company made only the tank-car rate regardless of weight. That rate was printed on a type-writer and posted in its offices. The association has inspectors to report any underweighing, and if a tank was billed at twenty thousand pounds and on weighing they found it to be more they should report the fact, the witness said, but the report, so far as we can discover, would perform no valuable function whatever. The posting of a rate in the company's office was supposed by the witness to show sufficiently that the company did not accept the rule of the association as to actual weights. In this he was in error. The public would have a right to understand that his rate sheet and the note in the classification were to be construed together, and effect given to both thus construed.

The correspondence between this witness and the complainant will best show the discrimination so far as it seems to have been personal.

May 16, 1887, the witness, in response to inquiries by the complainant, says the company has no tank cars and cannot furnish them. "Regarding charge for returning empty tank cars, we first wish to know to what points shipments of oil in tank cars would be made. Generally, however, I may say the rate returning would be one and a half cents a mile." "The rates on coal oil, car-load, from Louisville to Huntsville, Ala., are, in barrels, 37 cents per 100 pounds." This statement of the Huntsville rate was conceded to have been an error. The witness says the rate was 29½ cents, but was mistakenly given by a subordinate who wrote and signed the letter in his name.

May 18 complainant replied, complaining that the rates

actually made by defendant had the effect of discrimination as between tank-car and barrel shipments to the extent of over 50 per cent. in favor of the former, to the great injury of his business in favor of the Standard Oil Company, and adding :

"Please state why it is that the rates by barrel and bulk are made the same to some points and 50 per cent. difference to others, and how can you thus discriminate against me? Can't you give a lower rate than 37 cents per 100 pounds in barrels, Louisville to Huntsville, Ala., and are you not letting other shippers ship their oil at a less rate?"

"What I desire to know is, if you are willing to pro-rate on an equitable basis with the C., W. and B. on my oil shipments from this point. Please answer promptly and oblige."

May 21 the witness answers :

"The rate to Huntsville and to other points which we have quoted are as low as we are at present prepared to name."

Here the witness adopts and in effect repeats what he says was a mistake in his subordinate, after his attention had been specifically called to the figures. Complainant was thus notified that the rate to him would be 37 cents, though others were charged $29\frac{1}{2}$ cents only. In fact, there seem to have been shipments by the Standard Oil Company of Kentucky at $27\frac{1}{2}$ cents, but this charge was possibly an inadvertence. The answer proceeds to justify the difference in rates as between tank and barrel shipments, and then goes on to say :

"I do not see that it is any of your business whether we pro-rate with the C., H. and D. or C., W. and B. roads or not. You can doubtless obtain through rates from them, and the matter of division of revenue between those companies and our roads is a matter that concerns only our respective lines and not you."

Here was a third mistake. It was undoubtedly the business of the complainant to ascertain if he could, whether this company would pro-rate on an equitable basis with any other road over which he desired to ship his oil, and in that way obtain through rates. Nothing in the case shows that through rates were then in existence, unless it be the statement in this letter that through rates could doubtless be ob-

tained of the other roads; but if there were such rates there was nothing out of the way in complainant endeavoring to procure a modification, and his inquiry on the subject was not wanting in either civility or propriety.

Further the letter proceeded to say:

"In conclusion let me repeat that the rates furnished you are just as low as furnished anybody else; that whatever rates may be furnished by the L. and N. road apply to all shippers, and that all communications from you asking for rates of freight or appertaining directly to your shipments over our line will meet with respectful consideration and attention; but I have neither the desire nor the time to give attention to your letters asking for the reasons governing the policy of the Louisville and Nashville Railroad Company, criticising its rates, or suggesting basis for dividing rates between its connections and its own line, and I shall not reply to any such communications in the future."

This lacks accuracy, for the Huntsville rate was still 37 cents to complainant and 29½ cents to other persons, and it overlooks altogether the fact that "the policy" of the company, so far as it affected his shipments, was complainant's concern as well as the concern of the company, and he was entirely within the bounds of what pertained to his business as well as of right in endeavoring to bring about a change.

May 17, in answer to an inquiry from the office of the witness, complainant was given a rate of \$1.30 on oil in car-load lots, Cincinnati to Nashville. This is also conceded to be an error and an excess over the rate then charged to others; but the error was not corrected, as it should have been, in the subsequent correspondence.

August 29 complainant wrote the witness as follows:

"Please name rate on coal oil in barrels and tank cars, Louisville to Nashville, and advise what rate per tank car you allow; also rate to Columbia, Tennessee, car load, and what classification do you now use." On the next day he wrote again: "Please name rate on tank cars, Louisville to Montgomery, Ala., etc."

September 2, instead of answering these letters, the witness writes to ascertain by what line or lines the shipments

would be forwarded from Marietta ; a fact which could have no bearing on the inquiry made of him. His company was supposed to have regular and stated rates on its own lines, and he was asked to give them. He should have given them with the same promptness when the oil was to be delivered to him over another road that would be expected from him when the traffic originated at Louisville.

On the hearing the witness was asked whether he had not refused to give complainant rates on barrels to Knoxville and Nashville, and he replied :

“ No, sir ; not that I know of. I will add that I know of no reason why we should refuse him rates to Knoxville and Nashville, and I would say that we have not.”

It nevertheless appeared that the witness, on being pressed by complainant to give rates on defendant's line, referred him to Mr. Fraser, of the Cincinnati, Washington and Baltimore roads, for through rates. He was told in reply that Mr. Fraser refused to give rates, but he still continued to refer complainant back to him. The witness was asked by a member of the Commission—

“ What objection could you have, no matter over what roads the oil came to Louisville, to name rates from Louisville to Nashville ?”

“ Answer. Nothing, except that I thought he ought to get rates from the lines he dealt with. They had our rates.”

The question in substance was repeated for further answer.

“ Answer. Well, if Mr. Rice was prepared to or had delivered his oil directly, there would have been no objection. We would, of course, have been willing to name him tariff rates, but he was away from our line and we preferred to let him get the rates through our connections. We felt that if we furnished him a rate and that rate was advanced and we did not give him any special notice of the change, and he went along doing business basing his price on the rate that had formerly been quoted him, that he would hold us for the overcharge.”

“ Question. Was that the reason, so that you might be in position to advance the rates without notice ? ”

“Answer. Without special notice to him; that was the main reason. There was another reason that also influenced me in not giving him rates. I found that Mr. Rice had been asking the Cincinnati office for part of the rates, and our office for part of the rates; and while the rates in our office and in the Cincinnati office are supposed to be the same, still if he got the rates partly from my office and partly from the Cincinnati office we would not know to what points they had quoted him rates, and the Cincinnati office would not know to what points we had quoted him rates.”

“Question. What was the objection to his being quoted rates from any other office if they were the same?”

“Answer. If he got the rates from our office and he had to be notified by special letter in case of an advance in those rates, I would not know if the Cincinnati office had quoted him any rates, and would not be able to notify him of the advance in the rates quoted by the Cincinnati office. If he had to be notified by the Cincinnati office of an advance in rates they would not know that we had quoted him any rates. I was clearly of the opinion and still think that the proper place for him to get his rates was from the line that took his business in the first instance. With the number of people writing constantly for rates, the giving special notice to shippers of changes is very liable to be overlooked.”

It will be noted that this testimony comes from the officer who would be expected under the law to have the rates on his own lines printed and posted in the offices of the company, and open to public examination. If the rates were thus printed and posted much of the correspondence would seem to have been needless, and the inference is very strong that the law, in its spirit at least, was not observed. The injurious consequences resulting therefrom were not relieved by answers to complainant's letters. He was not given the rates because, as we are told, the officer supposed if that were done and the rates afterward changed he would be under obligation to give him personal notice of the change. This hardly seems a plausible excuse. The law imposed upon defendant's officers no obligation to give special notice to shippers in case of lawful change of rates, and the giving out of the

tariff sheets or the quoting of rates could no more create such an obligation than could the posting of the sheets at the company's stations, as the law required.

The witness was further asked whether he did not persist in his refusal to quote rates after he had been notified that Fraser declined to name them. He replied: "That is likely, but I do not think I am to be blamed for Mr. Fraser's action." This is quite true; he should not be blamed for Mr. Fraser's action. It was his own illegal refusal to act that he was blamable for. Mr. Fraser was not compellable to name rates over any road but his own unless he joined in making them; but this witness' obligation to give the rates on his own road was plain and unquestionable.

The two following letters will close the quotations from the correspondence:

From complainant to the witness, of date September 19, 1887: "Your two letters of the 13th, and one each of the 14th and 17th at hand. I have stated to you that Fraser, of the C., W. and B., the initial road, refuses to give me through rates by your road, and still, when I so repeat this to you several times you persistently ignore what I say and constantly refer me back again to him. This is now played out, and I now again ask you point blank, do you still refuse to give me the oil rates from Louisville as asked for in my several previous letters? A further refusal to give me these rates or to furnish them immediately I shall consider an absolute denial to give them. Your rates from Louisville are lower, as stated by me, and same denied by you, as an instance will quote. Brent Arnold, your agent at Cincinnati, quotes \$1.30 per barrel, Cincinnati to Nashville; Marietta to Cincinnati, 32 cents per barrel, or \$1.62 total. The rate from here (Marietta) to Louisville is fifty cents per barrel, and Brent Arnold quotes 18 $\frac{3}{4}$ cents per 100 pounds, Louisville to Nashville, this route via Louisville, thus saving me over 40 cents per barrel, provided you would so condescend to give me a rate from Louisville. This is a fine state of affairs. On September 8 I asked you to forward me a copy of each of your tariff or rate sheets issued since April 1, and to put me on your exchange list, so that I would be notified promptly of

any change in oil rates. This request you ignore and do not answer. By this means you would legally avoid all legal liability for any discriminations that could possibly arise, and where one is constantly asking for rates to ship on, this should be done and save so much correspondence; but you doubtless think otherwise. I take it for granted, unless I hear to the contrary, that you refuse to give me oil rates from Louisville. You do not answer my question in my letter of the tenth. I am desirous and will build immediately twenty tank cars to carry bulk oil over your system if you will guarantee or assure me that you will carry said oil in said tank cars at as low a net rate as accorded any other shipper."

To this the answer, of date September 27, was: "Your favor of the 19th instant was received during my absence, which has prevented an earlier acknowledgment of the receipt of it. I have nothing to add to my letters of September 13, 14, and 17 upon this subject."

Complainant did not succeed in obtaining rates. The denial of his right was plain and stands unexcused. Counsel for this defendant did not attempt on the argument either to show cause for it or explain it away. What reasons there may have been for it we do not know, but we find that they were not just or legal reasons. We further find that defendant was guilty of unjust discrimination against complainant, as charged, and that the discrimination was in favor of the Standard Oil Company of Kentucky and all other parties sending oil by tank cars. We further find that to the extent that rates on barrel shipments were erroneously given and persisted in, as in the case of rates to Huntsville and Nashville, defendant was guilty of unjust discrimination against complainant in favor of other parties sending their oil in barrels.

The case of the St. Louis, Iron Mountain Railway Company is confused somewhat in was in the correspondence, by the fact t operated for the period in question by t Railway Company. Some extracts from are here given.

April 28, 1887, complainant writes the commercial agent of these roads at St. Louis:

"Please give me the terms on which tank cars, empty, are returned, as I see by your classification it is by special contract; also, do you make bulk oil by weight per barrel when shipped in tank cars? If so, state the weight and how many gallons in bulk you figure on to the barrel. Can I ship one or more tank cars at same rate, or does the Waters-Pierce Oil Company or the Standard Oil Company have any preference as to number of cars shipped?"

May 2 he writes the assistant general freight agent:

"Do you take tank cars at 20,000 pounds regardless of weight, as your special rate (No. 54 A) is ambiguous on this point? At what weight per barrel in barrels and in bulk do you carry coal oil; also what special rate do you charge on return of empty tank cars when not furnished (or furnished by shipper)? Please name barrel and tank-car rates (car-loads), Palestine, Texas; Santa Fe, N. M.; Leavenworth and Atchison, Kansas, and Kansas City, Mo."

May 5 the commercial agent replies:

"Changes adopted at recent meeting of Texas Traffic Association at Houston made coal oil in barrels or cases, Class A, in car-load lots and in tank cars, minimum weight 25,000 pounds, 50 cents per 100 pounds, St. Louis to Houston, Galveston, Jacksonville, Texarkana, and intermediate stations."

The points here named are on defendant's road.

May 9 the assistant general freight agent writes:

"The weight of a tank car contemplated under our special 50 A is 20,000 pounds. Shipments of oil in barrels to points governed by Western Classification are taken at estimated weight of 400 pounds per barrel; to points governed by Joint Texas Classification at actual weight.

"With reference to rate on return empty tank cars I beg to advise that from Missouri river points—i. e., Kansas City, Leavenworth, and St. Joseph—we return them free when the same have been hauled over our line. The same rule applies on tank cars from Texas, with the understanding that no mileage is to be paid or allowed by the railroad companies."

"The rate on coal oil in tank cars, East St. Louis to Santa

Fe, is \$1.65 per 100 pounds actual weight; to Leavenworth, Atchison, and Kansas City, 25 cents per 100 pounds actual weight. The rate on coal oil tank cars, East St. Louis to Palestine, is 50 cents per 100 pounds, minimum weight 25,000 pounds."

This last rate is corrected to 45 cents by letter dated the next day. These letters of May 5th and May 9th are both written under the heading of Missouri Pacific Railway Company.

May 10 the commercial agent writes:

"In looking over our correspondence we note the concluding portion of your letter, which asks if Waters-Pierce Oil Company have any preference as to number of cars shipped? We answer, No, sir; you are exactly on the same level as any other oil-shipper over our line. We carry all shipments at actual weight and make the usual mileage charge on return of empty tanks."

This last statement was not warranted by the facts; defendant made an allowance to the owner of the car of three-fourths of a cent per mile for the use of the car.

May 11 complainant writes the assistant general freight agent:

"Do I understand that tank cars of bulk oil are taken at 20,000 pounds each? Also that 200 cases (or 60 barrels) are taken also at 20,000 pounds (per special rate No. 52 A)?"

May 16 complainant writes the commercial agent:

"Do you charge extra for return of empty tank cars; if so, how much?"

The special rate, 52 A above referred to, was put in evidence. It purports to be issued by the Missouri Pacific Railway Company and gives rates "on illuminating and lubricating oils in car-loads of 300 cases or 60 barrels, or per tank car of 20,000 pounds, from St. Louis, Mo., to Vinitia, I. T., \$65; McAlister and Muscogee, I. T., \$110." These points are not on defendant's road.

Also special rate 53 A, issued by the Missouri Pacific Railway Company, and taking effect at the same time, as follows: "Coal oil, car-loads, from St. Louis and Carondelet, Mo., to Newport, Ark., \$50 per car of 55 barrels, or per tank

car; Little Rock, Ark., \$50 per car of 55 barrels, or per tank car; Texarkana, Ark., 45 cents per 100 pounds." The rates per tank car by this last would apparently be irrespective of actual weight.

May 19 the assistant general freight agent writes complainant:

"Replying to your communication of the 11th, I beg to advise that the rates mentioned in our Special No. 52 on illuminating and lubricating oils are per tank car of 20,000 pounds; that the excess over the number of cases or barrels mentioned loaded in box cars, or the excess over 20,000 pounds contained in a tank will be taken at a proportionate rate per 100 pounds. In this connection I beg to advise you that our rate on oil in tank cars to McAlister and Muscogee is 50 cents per 100 pounds. In other words, we do not exceed to McAlister or Muscogee the rate which is made to Denison, 50 cents per 100 pounds when in tank cars."

May 21 complainant writes the assistant general freight agent:

"Do you actually in each and every instance weigh tank cars of oil as shipped out, as well as the empty tank cars on their return, and charge full net weight thereon as thus shown, or do you estimate them, or how do you do this? Please answer promptly and to the point and oblige."

May 26 an answer to other portions of this letter ignores the above query altogether.

Several other letters passed between the parties relating specially to the discrimination made by the published tariffs between the shipments in barrels and cans and by tank cars.

September 8 complainant writes the A. G. F. A.:

"Please inform me if you are still taking tank-car oil at an estimated weight per car, or do you actually weigh each and every car, or do you take the estimate given you by the consignor? Will you give me the same net rates and weight by tank car to Austin, Dallas, Palestine, Houston and Galveston, that you now give the Waters-Pierce Oil Company, or as low net rates as is given any shipper over your various lines, and please name me those rates to above points."

This was answered as follows:

“The charge on oil loaded on tank cars is on a basis of actual weight, minimum weight 25,000, at the established rates which are open to any shipper. This also answers your letter of the 8th to Mr. O'Connor.”

The minimum car rate is stated in the evidence to have been raised on defendant's road to 25,000 pounds in July.

September 23 complainant writes the A. G. F. A.:

“You refer to my two letters of the 8th, but fail to answer the most important part of those letters, which I repeat once more in order that you may clear up the obscurity of your vision. I am desirous and will build twenty tank cars to carry bulk oil over your system of roads provided you will assure or guarantee to me the same net rates that you allow the Waters-Pierce Oil Company, or as low a net rate in tank cars as is accorded to any other shipper to such general points as Austin, Dallas, Palestine, Houston, Galveston, and other points reached by your vast system.”

September 27 reply was made: “The rates charged by this company are open and alike to all shippers.”

September 30 the complainant writes the A. G. F. A.:

“Please inform me of the largest size or the largest capacity of tank cars you will carry over your lines and the largest capacity now used, and have you any particular requirements how they shall be built in order to conform to your general rules? *Will you state to me more definitely and assure or guarantee me*, in case I build tank cars, that you will give me as low net rates per car or per 100 pounds that you will give to the most favored shipper that ships in that manner over your lines, regardless of the quantity shipped? This assurance and guaranty I desire before I put my money into it, that I shall be treated exactly alike and have as low net rates in all other respects (regardless of commissions, &c.) that is accorded any other shipper, large or small. I am now in correspondence with tank-car builders on this subject, and desire an early answer.”

October 4 this was answered:

“We have no regulations governing the weight carried in tank cars different from the customary rules between western roads as to the weight carried in ordinary cars, nor do we

require these cars to be constructed on any special plans or dimensions. You are probably as familiar as our people with the kind of tanks customarily used. As to your request for further guaranty that you will be treated alike in the matter of rates, we can only refer to our previous letters on this subject, and to the laws under which our company operates as a common carrier."

It cannot be denied, we think, that complainant, from this correspondence, must have had some difficulty in determining for himself what he would be charged on shipments in tank cars. The statements are different, as they relate to different points on the roads in charge of the parties making them, and the limitation of 20,000 and 25,000, and the reference to actual weight are so presented as to be confusing to say the least. On May 5 complainant is given a rate to Texarkana by the tank car, 25,000 minimum weight, but the actual rate appears by special sheet, 53 A, to have been 45 cents per 100 pounds, irrespective of quantity, and the evidence, we think, strongly tends to show that the shipments to Texarkana were actually made up to July 11, regardless of quantity.

Whether the weight carried was ascertained by actually weighing the cars loaded and empty, complainant was not told, though obviously it was important that he should know. His persistent queries elicited no response. The evidence tends to show, however, that with the exception of a few shipments made early in the year, the actual weight was paid on; but certainly complainant was not to be blamed for being pressing and persistent in his inquiries when the published rate sheets were so far wanting in clearness and certainty. Had all the facts been known to him precisely as they are brought out by the evidence, it is not unlikely that this complaint would have been limited to the discrimination between the barrel and tank rates as shown by the published tariffs. We do not find evidence in the case that the officers of the road have made use of any devices to give further differences than those which the rate sheets show, and the tanks which were taken at uniform rates did not differ widely in size, as was the case on other roads.

It is apparent from the correspondence that, as regards the tank cars furnished and the return of them by the company after the oil has been delivered, this company was and perhaps still is, without any definite rule. It is impossible to doubt from the correspondence that the officers would have felt at liberty to make a charge to complainant for returning his cars if he had shipped over their lines. It is not claimed, as we understand it, that the Waters-Pierce Company was so charged at the time the letters on that subject were written.

On the whole, we find that neither the published tariffs nor the correspondence gave to the complainant the information he was fairly entitled to; that the effect was to repel his attempts to engage in shipping in tank cars in competition with the Waters-Pierce Oil Company, if in fact, his purpose was in good faith to enter into the competition.

On behalf of the Cincinnati, New Orleans and Texas Pacific and the Alabama Great Southern Railroad Companies a legal argument has been filed, the purpose of which is to demonstrate that the transportation of oil in barrels is so far a different traffic from the transportation of the same article in tanks, by reason of the different circumstances and conditions, that the charges made upon the one cannot be the proper measure of the charges to be made upon the other. In support of the general position thus taken quotations are made from *Great Western R. Co. v. Sutton*, 4 Eng. & Ir. Ap., 239; *Lotspeich v. Central Railroad of Georgia*, 73 Ala., 406; *Chicago, &c., R. R. Co. v. People* 67 Ill., 24; *Girardot v. Midland R. Co.*, 4 Railw. & Can. Traf. Co.'s, 291; *Nicholson v. Great Western R. Co.*, 5 C. B. (N. S.), 636; and as to reasonableness of charges, *Denby Main Colliery Co. v. Manchester, &c., R. Co.*, 11 App. Cas., 97; *Smith v. Pittsburgh, &c., R. R. Co.*, 23 Ohio St., 10, and *Evans v. Oregon, R. & T. Co.*, 1 Interstate Commerce Reports, 336, are relied on. These are instructive cases.

On this general subject we have already said all that we think necessary at this time. The traffic, in whichever method conducted, is one traffic. The two methods are different, but the chief difference is found in the fact that for the one the defendants furnish the rolling-stock and for the other they

do not ; but this difference cannot, on any grounds of equity or justice, entitle them to discriminate in their charges as against the method which is conducted according to the usual mode and by accepting the facilities they offer. The conditions are such that justice cannot be done to those who send their merchandise according to the customary mode, except by protecting them against the relatively lower rates which are given to those who adopt the other mode.

On the question of discrimination against the complainant the correspondence with the general freight agent of these roads will be instructive.

April 9th, and again on the 12th, complainant wrote the general manager of the first-named road for rates. On the 16th the general freight agent replied as follows: "The present rate on oil in barrels, car-loads, and also in tanks from Cincinnati to New Orleans is 34 cents; Birmingham, 47 cents; Meridian, 58 cents; Vicksburg, 54 cents; Knoxville, 24.4 cents; Chattanooga, 24.4 cents; Atlanta, 46 cents; Montgomery, 47 cents; Jackson, Miss., 61 cents; Mobile, 34 cents; Selma, 47 cents; Shreveport, 74 cents per cwt."

April 18 complainant again wrote: "Rates from Cincinnati received. The Standard are selling oil in Birmingham, Alabama, at prices which indicate a lower rate than you quote. I therefore desire to know if your rates from Ludlow or any other points on your lines are lower than rates named me from Cincinnati. Please advise and oblige."

This does not seem to have been answered, and the inquiry was renewed and elicited a response on the 28th as follows:

"Rates on coal oil. I beg leave to inform you that the rate on coal oil in barrels, car-load lots, Cincinnati to Birmingham, is 47 cents per 100 pounds.

"We have renewed rates to all points south of the Ohio and east of the Mississippi river, as published March 31. This basis will continue in existence until the Interstate Commission have definitely determined the question of the long-and-short-haul clause. You are, of course, aware that the S. R'y. and S. S classification makes coal oil, car-loads, sixth class."

The noticeable thing about this letter is that it refers to the classification of the Southern Railway and Steamship Association with an evident purpose to have complainant understand that this complainant recognized and accepted it. The proof shows that such was not the fact. Defendant, though it accepted it in part and circulated it with its rate sheets, repudiated it so far as concerned this traffic and some others, and its rates were materially different from what they should have been had that classification governed them. The repudiation of it, however, was only notified to the public by the making of special rate sheets which were not in conformity to it; obviously a very imperfect mode of giving the information.

May 28 complainant writes:

“Please state if oil in tank cars and barrels is under same classification, and also what rate per barrel you ask on barreled oil, also in bulk, per tank car, and how many gallons you allow to a barrel in bulk per tank car.”

May 4 the general freight agent replies:

“As stated in my last communication, the classification of coal oil in barrels in car-load lots is sixth class. I regret that I am not yet in position to quote through rates on coal oil in tank cars to all points reached by connecting lines, not having yet received the necessary information from them.

“I am not able to answer your inquiry as to how many gallons will be allowed to the barrel, but beg to assure you that every consignment will be waybilled upon an actual weight basis.”

Here is repeated the erroneous information about the classification.

May 4 complainant writes:

“Do you take tank cars of oil at actual weight—that is to say, do you weigh each and every car? At what rate per barrel do you now take barreled oil; also bulk oil per barrel, and how many gallons of bulk oil do you allow to a barrel; also what charges for return of empty tank cars? In my letter of April 18 I asked you if you were now giving any lower rates to other parties from shipping points outside of Cin-

cinnati on coal oil to the various points and places named to me per your letter of April 18. To this question you have not as yet answered. I would be much obliged if you would answer promptly."

This was not answered promptly, and on May 7 complainant writes complaining of the neglect, and also of discrimination between shipments in barrels and in tanks supposed to have been agreed upon at a meeting in Chicago.

May 9 the general freight agent replies:

"Rates on coal oil. Referring to your two favors of the 4th and 7th instant I regret that my frequent and enforced absences from Cincinnati have at times prevented as prompt replies being given to your communications as I would have wished.

"I beg to inform you that this company was not represented at any meeting held in Chicago on March 11th, and also that upon all shipments of coal oil in barrels we propose charging upon an actual weight basis.

"As you are aware, the classification of the Southern Railway and Steamship Association makes the rate on coal oil in barrels, car-load lots, sixth class. You are also aware that by special authority of the National Railway Commissioners the lines of the Southern Railway and Steamship Association have renewed their former rates, and I take pleasure in forwarding to you by this mail a copy of our latest tariff from Cincinnati.

"I think it hardly necessary for me to say that above rates will be charged to all shippers alike."

Here the mistake about the classification is again repeated. The reference to the National Railway Commissioners—by which this Commission was intended—was misleading, to say the least. The Commission never investigated coal oil rates, or gave "special authority" for their renewal; it never sanctioned any difference in the rates as between tank car and barrel shipments, and had never up to the date of this letter had its attention called to them in any way. What it did was to relieve the carriers represented in the association

temporarily from the strict rule of the fourth section of the Act to Regulate Commerce, with a restriction that in the meantime the disparities existing under their tariffs should not be increased.

May 11th complainant writes, and what he says regarding the classification of the Southern Railroad and Steamship Association is altogether natural under the circumstances:

"Yes; I am aware that the classification of the Southern Railroad and Steamship Association makes rate on coal oil in barrels sixth class (same as tank cars), but what does such issuance of a rate amount to when not lived up to by you and other lines? Mr. Gault wrote me and called my attention particularly to a printed circular issued by Virgil Powers, commissioner, dated November 1, 1886, in which barreled and tank car oil is both made sixth class. Your tariff sheet No. 11, dated November, 1886, just received, makes barreled oil fifth class and tank car oil sixth class. How do you reconcile this? But this difference is trivial compared to other more gross outrages practiced by your lines and others in carrying tank car oil by the lump (regardless of weight) at about one-fourth of that charged on barreled oil, pound for pound.

"You say that upon all shipments of coal oil in barrels we propose charging upon an actual weight basis. Does this apply to tank car shipments of bulk oil; and, if so, do you actually and without a question weigh each and every tank car of oil that goes over your line, and charge full weight thereon.

"Please name me rates on oil in tank cars and barrels to Lexington, Chattanooga, Atlanta, Birmingham, Jackson, Miss.; Meridian and Vicksburg, Miss.; Knoxville and Huntsville, Tenn.; Shreveport, La., and Montgomery, Ala. I trust and hope that you will give me these rates promptly.

"Please state if any charge for return of empty tank cars. Can you not pro rate with the C., W. & B., so as to give me through rates from here to above points?"

The reply May 14th is as follows:

"In my letter of the 28th ultimo, which you:

vised you that we had renewed rates to all points south of the Ohio and east of the Mississippi river, the same as were in effect on March 31st. I have already sent you copy of our tariff No. 11, which indicates rates now in effect and which have been in effect from the time we received from the National Commissioners the exemption from the fourth clause of the Interstate Commerce Law. I note your request to be furnished with rates to Lexington, Chattanooga, Atlanta, Birmingham, Jackson, Meridian, Vicksburg, Knoxville, Huntsville, Shreveport, and Montgomery, and will endeavor to obtain the necessary information from connecting lines, and advise you further as early as possible.

“I regret that we cannot pro rate with the C., W. & B. road and our rates will consequently apply from Cincinnati.”

The inquiry as to a charge for the return of the tank cars, it will be seen, is not responded to.

May 16th complainant writes to get rates and adds:

“Please inform me why you cannot pro rate with the C., W. & B. on the through rate on the oil from here. You certainly must pro rate with her on other business from other points, or from east and west.”

The answer May 20 was that “all shipments of coal oil pay our rates from Cincinnati, and we are not prorating on this traffic from any point whatever.”

Some other letters near this time are omitted as not being important to this controversy.

May 28 the general freight agent writes:

“Referring to recent correspondence and quoting rates to the points named in your letter of the 11th instant, I beg to inform you that the following rates on coal oil are obtainable from Cincinnati to the points named:

	In car tanks.	Car-loads per 100 lbs. in barrels.
Lexington.....	\$26 00	13 cents.
Chattanooga.....	50 00	33 “
Atlanta.....	61 80	46 “
Birmingham....	60 00	47 “
Meridian.....	60 00	45 “

Vicksburg.....	60 00	•	34 cents.
Knoxville.....	50 00		33 “
Huntsville....	37c. per 100 lbs.		
Shreveport.....	118 00		64 “
Montgomery.....	112 00		47 “

As bearing upon this table a list of shipments was given, some of the figures in which require notice. The rate—barrel rate—to Lexington was soon reduced to 10 cents per 100 pounds, the tank rate remaining the same. The average shipment in tank cars to that point seems to have been of 31,223 pounds weight, which would make the rate on tank-car shipments about 8.32 per 100 pounds, and the barrel rate about 20 per cent. higher. The only shipper to this point in either mode was the Standard Oil Company of Kentucky. In contrast to these the shipments from Cincinnati to Chattanooga were in tank cars varying from 25,000 to 43,815 pounds. The barrel rate was 33 cents per 100 pounds. The tank rate was \$50 per car. At 33 cents per 100 pounds the rate on the oil carried in the smallest car would have been \$82.50; on that carried in the largest it would have been \$144.50. On an average of the two it would have been \$113.54. The average makes the rate on barrel shipments 125 per cent. in excess of the rate on tank shipments, instead of 20 per cent. excess, as at Lexington.

A similar vast discrepancy was shown in the rates from Cincinnati to Meridian. The tank rate was \$60, which, if the tanks averaged 24,000, would make the rate per 100 pounds 25 cents; or, if they averaged 30,000, 20 cents; but while this charge remained, the rate on barrel shipments was raised to 56 cents per 100 pounds—probably not less than 175 per cent. excess over the tank-car rate.

May 30 complainant sent the following letters:

“ Please name rate on oil, tank cars and barrels, car lots, to Mobile and New Orleans.”

Also:

“ Yours 28th, enclosing rates, finally to hand, after several applications. These rates are prohibitory on my shipments, as you know full well. I am sure of method of the tank-

car shipment* in bulk is purposely used against me (who ships entirely in barrels) in order that I cannot compete with the Standard Oil Company in the sale of my products.

“By these rates thus given me to nine prominent points in the south you discriminate against my shipments not less than 67 per cent. and as high as 213 per cent., while to one—Huntsville, Ala.—you make the rate the same per 100 pounds for both barreled oil and that in tank cars. I will here show you how I arrive at this comparison:

“All the bulk oil carried in tank cars from the Pennsylvania oil regions to the seaboard pays the same amount for 50 gallons in bulk as for 50 gallons (including the barrel), or the empty barrel is carried extra to compensate for the return of the empty tank car, and cannot bring back freight as against a box car that can. I maintain and assert that the tank cars of the Standard Oil Company hold at least 100 barrels of 50 gallons (or 5,000 gallons each) *on an average*, while some of them hold over 6,500 gallons (or 130 barrels), but for a fair and equitable basis I will call it 100 barrels, and herewith give you the results and the amount of discrimination you dare to impose on me in the face and eyes of the Interstate Act:

From Cincinnati to—	Per car, tanks.	Per barrel.	Per 100 pounds in barrels of 400 pounds.	Per bbl.	Discrimi- nation.
Lexington, Ky.....	\$26 00 or	26	13c. or	52	100 per ct.
Chattanooga, Tenn..	50 00 “	50	33c. “	\$1 32	164 “
Atlanta, Ga.....	61 80 “	62	46 “	1 84	196 “
Birmingham, Ala.....	60 00 “	60	47 “	1 88	213 “
Meridian, Miss.....	60 00 “	60	45 “	1 80	120 “
Knoxville, Tenn.....	50 00 “	50	33 “	1 32	164 “
Shreveport, La.....	118 00 “	\$1 18	64 “	2 56	117 “
Montgomery, Ala... .	112 00 “	1 12	47 “	1 88	67 “
Vicksburg, Miss.....	60 00 “	60	34 “	1 36	126 “
Huntsville, Ala.....	(37c. per 100 lbs. for both.)				

“Do you really think that under the Interstate Act you can boldly go on and thus discriminate against my shipments to the ruination of my business, which you doubtless are willing to hazard in the interest of the Standard Oil Company so long as they foot the bills or compensate you for all damages that may accrue for such gross violations of the law?

"I desire to call your attention to section 10 of the Interstate Act as a further warning from one who wants to ship his oil products over your line, and to give you notice that for every tank-car load of oil, as well as for every smaller lot, L. C. L., that you have carried since the Interstate Act has taken effect, and all such from this time forth that discriminates or has discriminated against my shipments, I shall hold your road and all the officers concerned therein to a strict accountability for each and every offense. I emphatically protest against such gross discrimination, and call upon you to desist as an extra warning. If at any time you conclude to change your tactics upon this subject, please inform me."

June 2 came the reply:

"Your two letters of the 30th ultimo to hand. The rates on coal oil from Cincinnati to New Orleans are at present as follows: Tank cars, \$60 per car; barrels, thirty-four cents per 100 pounds.

"It will be necessary for me to communicate with my connections before I can quote rates to Mobile. I will, however, do this as early as possible. As regards the rate to Huntsville, I would explain that the M. & C. Co. refuse to make any reduction to the local stations; therefore, I could not give you a lower rate on coal oil in tank cars than is made on barrels. We very much prefer to handle this traffic in tank cars, and I should be glad if you could conveniently arrange to forward your oil in this manner. I completely fail to find any discrimination in this, as the rates are open to you and to all other shippers, and I shall be glad, indeed, if you can use them."

It is scarcely necessary to follow this correspondence further. From this time on it consists largely on the part of complainant of complaints he makes of discriminations as against barrel rates. We think and we find that complainant was unjustly discriminated against by the Cincinnati, New Orleans and Texas Pacific Railway Company during the whole period covered by the petition filed against it, and was also unjustly discriminated against by the same railway

company in connection with the Alabama Great Southern Railroad for the like period. We find that the tank rates, which were made uniform, regardless of quantity, were in themselves an unjust discrimination. The general freight agent notifies complainant that they were made on an estimate of seventy barrels capacity. A statement put in evidence by the Standard Oil Company of Kentucky, which was the principal shipper in tank cars, showed the average capacity of tanks made use of in their shipments to be over a hundred barrels. This increased enormously the difference between rates in barrel and tank shipments, which we have already found would have been excessive had the capacity of the tank cars been no more than it was assumed to be.

We also find that there was unjust discrimination as against complainant and in favor of the Standard Oil Company of Kentucky, in this, that from April 5th to April 21st defendant was nominally making a uniform rate on oil in barrels and in tank cars by the hundred pounds, but it shows without dispute that the Standard Oil Company of Kentucky was during that time sending oil in tank cars over defendant's road apparently at tank-car rates. If the rates were computed by the hundred pounds it was not only on an assumed basis, but on one that fell far short of actual weight. In point of fact, there was no shipment whatever in tank cars by weight.

It is noticeable also that it was not until May 28 that complainant was enabled to obtain tank-car rates to Lexington, Chattanooga, Atlanta, and other towns named in his letter of that date, yet the Standard Oil Company had all the while been shipping to those points over this road, and, of course, had rates given it.

It is further to be noted that complainant was not, on his request for it, given the information whether, if he supplied himself with tank cars and sent his oil by that mode, he would be charged for the return of the empty cars. He should have been given the very important information that trackage was paid by defendant instead of a charge exacted.

The general freight agent failed on the hearing to explain why he several times made reference in his letters to the classification of the Southern Railway and Steamship Association. The circumstances fairly called for such an explanation. It is an important fact, which this officer should have perceived, that without this classification sheet a shipper would be unable to ascertain what the rates over his road were without coming to him for them, and yet his company accepted the classification only in part, and claimed not to be responsible for it further. He seems to ignore the fact that, except in connection with the classification, the publication of his rates is not in compliance with the law.

It is quite possible that this officer and also the corresponding officer of one or more of the other defendants did not believe complainant was in good faith endeavoring to obtain tank rates for his own use. We do not ourselves know that he was; but that was no excuse for keeping from him or from anybody else a knowledge of such facts as would affect the rates. The general public had a right to know what the rates were, and any one who was contemplating even the possibility of making use of them had special right to ask for them. Complainant had a *legal right* to know whether, when the charge was to be made by the 100 pounds, it would be on an actual weighing or on an estimate.

He had an equal right to be informed that instead of being charged for the return of the empty car he would be paid for its use.

The published rate sheets, so far as they related to rates on the lines of these defendants, ought to have given the information on both these points, and if they were blind or ambiguous it should have been supplied on request.

The Newport News and Mississippi Valley Company, and the Louisville, New Orleans and Texas Railroad Company, we find to have been guilty of discrimination against complainant in taking tank cars irrespective of capacity, on an assumption that the average capacity was eighty-five barrels, and charging therefor a rate which, as compared with the rate on barrel shipments, would have been relatively too low

had the capacity been as was assumed, and which was relatively very much too low in view of the actual capacity.

On the hearing it was insisted on behalf of the first named of these two defendants, that the assumption on which its rate was estimated was made in good faith, and upon information given by an agent of the Standard Oil Company of Kentucky, which was believed to be correct, but which proved not to be so. The agent who gave the information was before the Commission and admitted giving it, but insisted it was given after the shipments in question were made, and that, as he understood the question put to him, it related to another line of cars, and not to the line in use on defendant's road. It is, perhaps, not very important now whether defendant's officer was or was not in fact misled. The mischief, so far as concerned the business of complainant, was done by giving tank-car rates instead of rates by the weight or quantity; and this wrong, which was one of policy on the part of this defendant, was made more prominent and perhaps damaging by a misstatement in the correspondence.

Complainant had expressed a purpose to obtain tank cars for his own business, and was desirous to know whether he was to be charged by the car irrespective of the capacity. This, we have seen, was the practice on the road of this defendant; but in reply he was told that the tank car was estimated at 20,000 pounds, and if the weight was more the excess would be charged for. To make sure on this point he wrote the general freight agent, and the reply, June 1, 1887, was, "A tank car is supposed to weigh 20,000 pounds; if it weighs more, then we will charge for it." In point of fact the assumption was that the weight was very much greater: 85 barrels at 325 pounds each would be 27,640 pounds, and the defendant did not make any additional charge when the weight reached 35,000 pounds, as it sometimes did. If this statement was made in good faith it is difficult to account for it, and it is not accounted for. If it was the result of mere carelessness it was not the less misleading to complainant. The necessary tendency was to discourage him from entering into competition in this mode of shipment if he had a purpose to do so, as he professed to have. Had he provided

himself with cars for tank shipments and been charged as he was told he would be, the discrimination against him would have put success in the traffic out of question.

It appears that this company had no rule or settled practice as to paying trackage for the use of tank cars, and considered itself at liberty to deal with that subject by special contract. The facts were brought out by questions put by members of the Commission as follows :

“ Question. Do you pay car service on the tank cars?

“ Answer. On some cars only. We have an arrangement by which we do not pay.

“ Q. On which do you not pay?

“ A. We have an arrangement with M. K. Fairbanks & Co. I do not think we pay anything on those cars, but we haul them empty free.

“ Q. Well, on the other cars do you pay car service the same way?

“ A. We are compelled to pay the same as our competitors, or we could not get the cars to handle that business. It is three-fourths of a cent a mile.

“ Q. What do you mean by ‘that so far as this company is concerned we do not pay mileage in either direction or haul any empty cars free?’

“ A. That letter was written in April. At that time the matter was being discussed between the lines that refused to pay mileage on any cars, and because they spoke of its being abrogated by all lines.

“ Q. Then your statement there that you do not pay mileage was based on the belief that the conference resulted in their refusing to pay?

“ A. Yes, sir; refusing to pay mileage on all empty cars, but I told Mr. Rice in person that we would allow him the same as anybody else.

“ Q. Is your tank-car mileage the same as it is on any other cars?

“ A. Yes, sir; three-fourths of a cent.

“ Q. That is the regular mileage paid on cars?

“ A. Yes, sir.

“ Q. Can you specify the shippers to whom you pay mileage and those you do not ?

“ A. That is an account not kept in my office, but I know that with some we have an arrangement not to pay mileage.

“ Q. You have no uniform rule on that subject ?

“ A. That depends on the kind of agreement made on the business.

“ Q. As far as you know, M. K. Fairbanks & Co. is the only concern to which you do not pay mileage ; is that it ?

“ A. I cannot say that.

“ Q. You have stated that it is the only concern you know of ?

“ A. No, sir ; I am not prepared to say it is. I do not know it to be so, because I think possibly others are not paid mileage by us.

“ Q. How is it with reference to the Union Tank Line cars ?

“ A. I think it very possible, but we do not keep that account in my office.”

Here, it is obvious, are or may be present all the mischiefs that attend the giving of special rates and rebates. The railroad manager who supposes this to be admissible has not fully grasped the significance of those features of the Act to regulate commerce which were enacted to establish uniformity, equality, and publicity.

It is proper to say on behalf of those two defendants that after the filing of the complaint their rates were revised and made much more reasonable and just. It is also proper to give them the benefit of the protest made by the general agent of the first-named company against being supposed to have intentionally carried the very large tanks with knowledge of the actual capacity. If the officer was misled, as he claims to have been, the blame should fall upon the party deceiving him. We cannot say in this case that there was anything more than an honest misapprehension, and are inclined to think that such was the fact ; but one of the difficulties attending cases of this nature is, that while the law imposes severe penalties on the carrier and its agents for

acts on their part designed or calculated to create discrimination as between shippers, it imposes none on shippers themselves who by artifice, misrepresentation, false billing, or other deception of the carrier secure advantages to themselves which it would be illegal and punishable for the carrier voluntarily to grant. If, therefore, the agent of the Standard Oil Company had purposely misled the defendant's officer in the matter referred to, and thereby obtained an unfair advantage, the complainant would be without redress, unless on the ground of negligence defendant could be held responsible for acting upon the false information.

The Illinois Central Railroad Company we find to have discriminated unjustly against complainant by making some of the barrel rates excessively high as compared to those on tank-car shipments, and also by shipping at car rates, irrespective of quantity, while leading complainant to understand that if the capacity exceeded a specified minimum the excess would be charged for.

From the evidence it appears that during the period in controversy tank-car shipments were made over the road of defendant to New Orleans only. To points to which no tank-car shipments were made this defendant did what was also done by the Louisville and Nashville Railroad Company in some cases—made the same rates by the 100 pounds, whether shipments were in tanks or barrels. If these equal rates were offered to the public in good faith, defendant ought to be compelled to give the like uniform rates to points to which tanks were sent, and if they were not offered in good faith the defendant ought to be held estopped by its own rate sheets from disputing the justice of this uniform rule.

But in this case we find, as we have so often found in others, that parties applying for tank-car rates are misled into supposing they are graded by quantity, when in fact they are uniform by the tank car.

May 3, 1887, the general freight agent of defendant wrote complainant as follows:

“Yours without date. I replied to your previous letter

promptly, stating that the rate on oil from Cairo (according to the tariff sent you) when in full car-loads would take fourth class, released, whether in tanks or barrels, which will give the information desired."

May 4 he wrote again :

"Yours of the 30th ultimo. Our rates on oil in car-loads, released, 20,000 pounds and over, Cairo to Jackson, Miss., 50 barrels and over, \$1.65 per barrel ; in tank cars, 24,000 pounds and over, 37 cents per 100 pounds ; Cairo to N. O., in barrels or tank, car-loads, 24,000 pounds and over, 24 cents per 100 pounds.

"We have no rates at present in effect from Cleveland, but would refer you to H. Coope, Ga., O. & W. railroad, Cincinnati, Ohio, for rates from that point to N. O. and Jackson, Miss., via Odin."

What is noticeable in these letters is that the rate given is the same on shipments in the two modes, and that a minimum car-load rate is mentioned. The agent explains in oral testimony before the Commission that the rates here specified were old rates temporarily restored, and that there was a complete revision of rates afterwards.

May 31 the agent writes complainant :

"Rates on oil.—I have your much-appreciated favor of the 26th instant. We charge for actual weights on oil, whether in tanks or barrels, and as previously advised, our rates are to all shippers alike.

"Tanks which are hauled one way loaded are at present returned without extra charge in the same manner as other foreign cars are handled.

"The Mississippi Valley joint classification makes coal oil in car-loads, whether in wood or in tanks, fourth class, which rates we charge to points taking Mississippi Valley joint classification."

The agent says of this letter in his oral evidence :

"That refers to oil to local stations. It does not refer to New Orleans, as Mr. Rice had been repeatedly advised what the rate was there."

Now put this in plain English it is this: Defendant proposed to charge for actual weight on oil in tanks to the

points *only* to which no shipments in tanks were made. The offer of equal rates to the shippers in barrels was therefore illusory.

September 30 complainant wrote the general freight agent—

“I desire and propose to build twenty tank cars immediately to run over your lines, provided you will assure or guarantee me as low net rates as you accord to any other shipper, regardless of quantity shipped; also that you will carry oil for me in tank cars from any point or station on your line to points on and beyond your lines at the same proportionate (or division of a through rate) that you receive or get out of the most favored shipper.

“Please state how large capacity of tank cars you would allow to run over your road and how large tank cars have been used on your road; please answer promptly.”

The answer, November 2, is as follows:

“Rate on oil from Cairo.—Upon returning to my office, after an absence of several weeks out on the line, I find your favors of September 30 and October 13.

“Coal oil or its products in barrels is now third class; if released, sixth class; actual weight to be charged for each case, but not less than 24,000 pounds per car-load. I trust this heavy reduction in our local rates will enable you to do a large business over our line. As regards our guaranteeing you as low net rates as other shippers are charged I have repeatedly assured you that our rates are the same to all shippers, and I do not know that I can do any more than already stated in this matter.

“I believe the largest tank cars we have ever hauled over our line contained about 40,000 pounds and as low as 20,000 pounds.

“I trust these new rates will enable you to ship over our line not only to the strictly local stations, but to Jackson, Tenn., Holly Springs, Grenada, and Jackson, Miss., as well, at all of which points there is a good trade.

“We would also like to handle business for you to Aberdeen, West Point, and Starkville, Miss., which points we can reach via Durant and C., A. and N. railroad.”

This answer was as polite as it was misleading. The party writing desires us to understand that it had no reference to shipments to New Orleans; though nothing in it or in the letter to which it was an answer would restrict it in any such way; and how this officer could reconcile it to his duty to his own company or to the public to allow shipments of 40,000 pound tanks to New Orleans at the rates charged on tanks of 20,000 pounds he fails entirely to explain, as he does also to explain or excuse his discrimination in this regard between shipments to New Orleans and those complainant might make to other points to which the other shippers over defendant's line were not sending tank cars.

Here, again, the question of paying for the use of the tank cars comes in question. It has been seen that on May 31 the general freight agent wrote: "Tanks which are hauled one way loaded are at present returned without extra charge, *in the same manner as other foreign cars are handled.*" What is meant by this we do not know. All the evidence adduced before us tends to show the rule to be that foreign cars are not merely returned without charge, but that their use is paid for.

This officer being on the stand, the following proceedings took place:

"Q. What mileage do you pay for the use of tank cars?"

"A. I have nothing to do with mileage.

"Q. Have you no knowledge as to the amount of mileage paid?"

"A. If there is any paid it is three-fourths of a cent, the same as other cars. We make no discrimination in that matter.

"Q. You treat one car the same as you do the other?"

"A. That is my understanding."

If the general freight agent of the defendant did not know what the rule was on this important subject, it may be safely assumed that the defendant made no publication which gave the information to the general public. So long as that was the case a protest that the defendant makes no discrimination is not very assuring. The public was entitled to information given in an authoritative way as a part of the rate

sheet itself, and should not have been left to a suppose or imagine that it was or might be the subject of private arrangement.

Nothing in these cases more distinctly challenges attention than the fact that several of the defendants, while giving tank rates regardless of the quantity carried, informed complainant, when interrogated by him on the subject, that if the quantity exceeded a certain specified weight a charge would be made for the excess. The published rate sheets ought to have given clear and reliable information on the subject, and it was only because they were silent or ambiguous that the inquiries became necessary. The remarkable thing about the matter is that so many of these defendants should make the same mistake; a mistake, too, that it was antecedently so improbable any one of them would make. The Louisville and Nashville, the Cincinnati, New Orleans and Texas Pacific, the Newport News and Mississippi Valley, and the Illinois Central Companies are all found giving out the same erroneous information, and no one of them can tell how or why it happened to be done, much less how so many could contemporaneously, in dealing with the same subject, fall into so strange an error. It is to be noted, too, that it is not a subordinate agent or servant who makes the mistake in any instance, but it is the man at the head of the traffic department, and whose knowledge on the subject any inquirer would have a right to assume must be accurate. In no case is the error excused, and if it be conceded that there was no purpose to mislead, the case is not relieved of unpleasant features, for gross negligence, when it is damaging, may be equally culpable with wrongs of intent.

In our review of these cases two facts have been constantly pressing upon attention, as constituting cogent if not conclusive proof that the several defendants operating lines east of the Mississippi were not endeavoring by their tariff sheets to adjust their rates on grounds of relative justice, as between themselves and their patrons, and also between the two classes of patrons, and that the considerations which they say in their answers and testimony entitled them to make the higher charge on barrel shipments were not controlling in the fixing of rates.

One of these facts is that they made tank-car rates regardless of quantity. It cannot be said that this was done in ignorance of the great difference which existed. It clearly appears that it was generally known that the differences were very great. If it had not been known it should have been. The evidence shows that the weight and capacity of the tank cars of the Standard Oil Company of Kentucky were not stenciled upon them, as was the case with the like cars of some other lines, but the difference in size must have been very obvious to the eye, and defendants, it is to be presumed, had the means at any of their important stations to weigh or gauge them.

The other fact is that the discriminations were made on no principle, and could not possibly have been measured from a consideration of the circumstances which defendants say entitled them to impose the heavier charges on the traffic carried on in barrels. Sometimes the rates were made the same, and when that was the case no reason has been assigned therefor, which would embrace all the cases and distinguish them from other cases in which the discriminations were very great; but when discriminations were made the excess in charge upon barrel shipments varied from twenty per cent. to two hundred or more. Neither greater risks, greater expense, competition by water transportation, or any other fact or circumstance brought forward in defense, or all combined, can account for these differences. The conclusion is irresistible that the rate sheets were not considerately made with a view to relative justice.

We have thus, with as much brevity as was practicable, in view of the great bulk of evidence, reviewed these cases and expressed our conclusions. It remains only to direct what orders shall be entered in these cases, respectively.

In the case against the Louisville and Nashville Railroad Company order will be entered that the defendant do forthwith cease and henceforward abstain from the unjust discrimination found to exist in its charges for the transportation of petroleum oils as between shipments in barrels and in tanks, and from making any higher charges by the hun-

dred pounds for the transportation of the oils in barrels, including the barrels, than it makes or shall make, contemporaneously, for the transportation of the like weight of the oils in tanks.

It will be further ordered in the same case that the said defendant do forthwith cease and hereafter abstain from making uniform rates for the transportation of petroleum oils by the tank car instead of by weight or quantity when the capacity of the tank cars in use on the lines of road is not uniform or nearly so ; the necessary effect of such uniform rates by the tanks being to establish unjust discriminations and to give to shippers of oil in tanks undue and unreasonable preference and advantage.

In the case against the St. Louis, Iron Mountain and Southern Railway Company order will be entered that the defendant do forthwith cease and henceforward abstain from the unjust discrimination found to exist in its charges for the transportation of petroleum oils as between shipments in barrels and in tanks, and from making any higher charges by the hundred pounds for the transportation of the oils in barrels, including the barrels, than it makes or shall make contemporaneously, for the transportation of the like weight of the oils in tanks.

In the case against the Cincinnati, New Orleans and Texas Pacific Railway Company order will be entered in the same terms as the order above directed to be entered against the Louisville and Nashville Railroad Company.

In the case against the Cincinnati, New Orleans and Texas Pacific Railway Company and the Alabama Great Southern Railroad Company order will be entered in the same terms as the order above directed to be entered against the Louisville and Nashville Railroad Company.

In the case against the Newport News and Mississippi Valley Company and the Louisville, New Orleans and Texas Railroad Company order will be entered in the same terms as the order above directed to be entered against the Louisville and Nashville Railroad Company.

In the case against the Newport News and Mississippi Valley Company and the Illinois Central Railroad Company order will be entered in the same terms as the order above directed to be entered against the Louisville and Nashville Railroad Company.

In the case against the Illinois Central Railroad Company order will be entered in the same terms as the order above directed to be entered against the Louisville and Nashville Railroad Company.

In the case in which the Illinois Central Railroad Company is sole defendant it is unnecessary to enter any order at this time. In so far as discriminations have arisen from rates on tank shipments they will be corrected by this company if the order made against it in the case last above mentioned is observed. As to the further controversy which this case presents, what is said in the cases against the Mobile and Ohio and the Mississippi and Tennessee Railroad Companies is directly in point.

In each of the cases in which an order is to be made, as above stated, a report and finding of facts and conclusions is entered herewith and is to be considered a part hereof.

The following is the report and finding in the case against the Louisville and Nashville Railroad Company.

The parties in this case having brought the same to a hearing on oral proofs and printed arguments, and the same having been duly and fully considered, the Commission now finds from such proofs the facts following:

That the defendant, the Louisville and Nashville Railroad Company, is and was on the 22d day of July last, and for several years theretofore has been, a common carrier engaged in the transportation for hire of property by a continuous carriage or shipment by means of railroads owned, leased, or operated by it from Cincinnati, in the State of Ohio, to Louisville, Lexington, Frankfort, Bloomfield, and Bardstown, in the State of Kentucky; to Nashville, Guthrie, and Memphis, in the State of Tennessee; to Montgomery,

Mobile and Selma, in the State of Alabama; to New Orleans, in the State of Louisiana; to Evansville, in the State of Indiana, and to St. Louis, in the State of Missouri, and from Cincinnati aforesaid and Louisville aforesaid to all points on its lines of railroad between said cities and the several other points above named.

That complainant is and has been ever since the fifth day of April, 1887, engaged at Marietta, Ohio, and its vicinity in the business of producing, manufacturing, and dealing in petroleum oils and shipping them to various markets in the Southern and Western States, and has during all the time aforesaid been desirous of making use of the services and facilities of the defendant as such common carrier as aforesaid for the transportation of such oils from Cincinnati and Louisville aforesaid to other points above named, and to other southern and western points of sale.

That, in order to have such facilities and to obtain such services, complainant repeatedly, from the said fifth day of April, 1887, up to July 22, 1887, applied to the said defendants, its agent and officers, for rates upon the transportation of such oils, and that defendant made to complainant, when it gave rates to him for such transportation, on such applications, charges which were not reasonable and not just, but were excessive, and in violation of the first section of the Act of Congress to Regulate Commerce, approved February 4, 1887.

That the method in which complainant offered oil for transportation on defendant's lines of road, and on which such excessive charges were made as aforesaid, was in barrels; that he had many competitors in the markets to which he proposed to ship the same, the principal of which was the Standard Oil Company of Kentucky, which shipped oils principally in large tanks, a tank of oil constituting a car-load; that defendant from said fifth day of April, 1887, up to July 22, 1887, all the while made rates on the transportation of oils in tanks which were relatively greatly lower than the rates it made contemporaneously on the transportation of oils in barrels, and in doing so defendant was guilty of unjust discrimination as against complainant, contrary to

the provisions of section 2 of said Act to Regulate Commerce.

That in so making rates on the transportation of oil in tanks which were relatively greatly lower than the rates contemporaneously given on the transportation of oil in barrels, defendant was guilty of giving undue and unreasonable preference and advantage to the said Standard Oil Company of Kentucky and to all other persons and corporations who delivered petroleum oils to it for transportation on its roads, and of subjecting the complainant to unreasonable prejudice and disadvantage, contrary to the provisions of section 3 of said Act to Regulate Commerce.

That said defendant during all the period aforesaid was further guilty of unjust discrimination against said complainant and of giving further undue and unreasonable preference and advantage to the said Standard Oil Company of Kentucky, and to all other persons and corporations who delivered petroleum oils to it for transportation in tanks by giving to them tank-car rates, irrespective of quantity carried in the tanks, though the tanks greatly differed in capacity and in load, the necessary effect of which was greatly to increase the difference between the rates for the transportation of the oils in tanks and in barrels, respectively, though the same was otherwise too great and unjustly discriminating as before stated; the so giving of tank rates under the circumstances being in violation of sections 2 and 3 of said Act to Regulate Commerce.

That said excessive rates and charges, and said unjust discriminations and the giving of said undue and unreasonable preference and advantage, all concerned and had respect to consignments of oil made or offered by complainant for transportation from one of the States of the United States into or through one or more other States of the United States, over the roads of the said defendant, operated by it in interstate commerce as a common carrier as aforesaid.

That complainant was wronged and damnified by such excessive rates and charges, and by the unjust discrimination aforesaid, and by the undue and unreasonable preference and advantages given to others as aforesaid.

That no higher charge can rightfully be made by defendant for the transportation by the hundred pounds of such oils in barrels, including the barrels, than is or shall be contemporaneously made for the transportation by the hundred pounds of such oils in tanks, and that order should be made that said defendant do forthwith cease and desist from making such higher charge.

That order should further be entered requiring defendant wholly to cease and desist from making uniform rates for the transportation of petroleum oils by the tank car, irrespective of weight or quantity, when the capacity of the tank cars in use on its line is not uniform or nearly so, and also wholly to cease and desist from further giving undue and unreasonable preference and advantage to the Standard Oil Company of Kentucky, and to others shipping oil in tanks, over complainant and others shipping oil in barrels.

For a further understanding of the reasons leading the Commission to its conclusions reference is made to the opinion in this case and in other cases heard with it, which is this day entered of record herewith, and is to be considered a part hereof.

The findings in the cases against the Cincinnati, New Orleans and Texas Railway Company; against the same company and the Alabama Great Southern Railroad Company; against the Newport News and Mississippi Valley Company, and against the same company and the Illinois Central Railroad Company, were in substance the same as the foregoing.

The following is the finding in the case against the St. Louis, Iron Mountain and Southern Railway Company.

The parties in this case, having brought the same to a hearing on oral proofs and printed arguments, and the same having been duly and fully considered, the Commission now finds from such proofs the facts following:

That the defendant, the St. Louis, Iron Mountain and Southern Railway Company, is and was on the 22d day of July last, and for several years theretofore had been, a common carrier engaged in the transportation for hire of property by a continuous carriage or shipment, by means of a line

of railroad owned and operated by it, from the city of St. Louis, in the State of Missouri, to the cities of Newport and Little Rock, in the State of Arkansas, and the city of Texarkana, in the State of Texas, and beyond.

That complainant is and has been ever since the 5th day of April, 1887, engaged at Marietta, Ohio, and its vicinity, in the business of producing, manufacturing, and dealing in petroleum oils and shipping them to various markets in the Southern and Western States, and has all the time aforesaid been desirous of making use of the services and facilities of defendant, as such common carrier as aforesaid, for the transportation of such oils from St. Louis aforesaid, and from other points on the line of defendant's road to points in other States.

That, in order to have such facilities and obtain such services, complainant repeatedly, from the said 5th day of April, 1887, up to July 22, 1887, applied to said defendant, its agents, and officers, for rates upon the transportation of such oils, and that defendant made to the complainant for such transportation, on each of such applications, charges which were not reasonable and just, but were excessive, and in violation of the first section of the Act to Regulate Commerce, approved February 4, 1887.

That the method in which complainant offered oils for transportation on defendant's line of road, and on which such excessive charges were made as aforesaid, was in barrels; that he had many competitors in the markets to which he proposed to ship the same, the principal of which was the Waters-Pierce Oil Company of St. Louis, Missouri, which company shipped principally in large tanks, a tank of oil constituting a car-load.

That defendant, from said 5th day of April, 1887, up to July 22, 1887, all the while made rates on the transportation of oil in tanks which were relatively greatly lower than the rates it made contemporaneously on the transportation of oils in barrels, and in doing so defendant was guilty of unjust discrimination as against complainant, contrary to the provisions of section two of said Act to Regulate Commerce.

That in making rates on the transportation of oil in tanks which were relatively greatly lower than the rates contemporaneously given on the transportation of oil in barrels, defendant was guilty of giving undue and unreasonable preference and advantage to the said Waters-Pierce Oil Company of St. Louis, Missouri, and to all other persons and corporations who delivered petroleum oils to it for transportation on its road, and of subjecting the complainant to unreasonable prejudice and disadvantage, contrary to the provisions of section 3 of said Act to Regulate Commerce.

That said excessive rates and charges and the giving of said undue and unreasonable preference and advantage all concern and refer to consignments of oil made or offered by complainant for transportation from one of the States of the United States into or through one or more other States of the United States over the road of the said defendant, operated by it in interstate commerce, as a common carrier as aforesaid.

That complainant was wronged and damnified by such excessive rates and charges and by the unjust discrimination aforesaid and by the undue and unreasonable preference and advantage given to others, as aforesaid; that no higher charge ought to be or can rightfully be made by defendant for the transportation by the hundred pounds of such oils in barrels, including the barrels, than is or shall be contemporaneously made for the transportation by the hundred pounds of such oils in tanks, and that order should be made that said defendant do forthwith cease and desist from making such higher charge, and thereby giving undue and unreasonable preference and advantage to parties shipping oil in tanks over complainant and others shipping oil in barrels.

For a further understanding of the reasons leading the Commission to its conclusions, reference is made to the opinion in this case and in other cases heard with it, which is this day entered of record and which is to be considered a part hereof.

**RIDDLE, DEAN AND CO. v. THE NEW YORK, LAKE
ERIE AND WESTERN RAILROAD COMPANY
AND THE PITTSBURGH AND LAKE ERIE
RAILROAD COMPANY.**

Tried January 31 and February 1, 1888.—Decided February 24, 1888.

Contracts between railroad companies for the advantageous transaction of business at a given point involve corresponding obligations to the public.

Regular patrons are not entitled to preference in the use of equipment of common carriers; the public must be justly and equally served.

Obligation of common carriers to transport freight arises upon tender of same for transportation in the usual way, without any special agreement; compensation for the service is secured by a lien upon the goods except when payment in advance is made.

Selection of either goods or customers is forbidden to common carriers; less desirable traffic which is ordinarily the subject of transportation and not dangerous to handle, must be accepted upon reasonable terms, as well as that which is more desirable.

It is not a valid excuse for refusal to furnish a fair allotment of a certain class of cars that they can be more profitably employed, and can supply the wants of a larger number of shippers upon another portion of the line.

Undue preference found to have been given by defendants, to the prejudice of complainants, upon the facts stated.

J. L. Black, for complainants.

James A. Buchanan, for N. Y., L. E. & W. R. R. Co.

J. H. Reed, for P. & L. E. R. R. Co.

REPORT AND OPINION OF THE COMMISSION.

WALKER, Commissioner:

Riddle, Dean and Company, the complainants, of Pittsburgh, Pennsylvania, are a firm who act as sales agents for various mines, and are engaged in selling coal upon commission. Coal mined in the vicinity of Pittsburgh is sold at Cincinnati, in the State of Ohio, the usual method of transportation being by boat down the Ohio river. In 1887 the water in the river was low for an unusual period, so that the transportation of coal by that method was interrupted from June to about January 1, 1888. The supply of coal at Cin-

cinnati became short, and the price at that point rose until it became an object to make shipments by rail. Such a condition of affairs has previously occurred, but not often.

About November 1st the complainants obtained an order from Cincinnati for a considerable quantity of coal and placed it with the owners of the Federal Springs mines. These mines are situated upon the Pittsburgh, Chartiers and Youghiogheny railroad, a short line which connects with the Pittsburgh and Lake Erie Railroad at Chartiers, about six miles northwest from Pittsburgh. From Chartiers the Pittsburgh and Lake Erie railroad further extends in a northwesterly direction about sixty-two miles to Youngstown, Ohio, at which point it connects with the New York, Pennsylvania and Ohio railroad, which is operated by the New York, Lake Erie and Western Railroad Company as lessee. The New York, Pennsylvania and Ohio railroad extends from Salamanca, New York, to Dayton, Ohio, with various branches, one of which crosses said main line at Leavittsburg and forms a direct line from Youngstown to Cleveland, Ohio. At Dayton said New York, Pennsylvania and Ohio railroad connects with the road of the Cleveland, Columbus, Cincinnati and Indianapolis Railway Company (hereinafter called the Columbus Company), over which it reaches Cincinnati, 56 miles beyond Dayton.

By an agreement in writing, dated September 15, 1885, a copy of which is on file with the Commission, the terms upon which business from the New York, Lake Erie and Western Railroad (hereinafter called the Erie Company) is taken to Cincinnati are very precisely regulated. Said agreement is referred to as part of this statement of facts and need not be recited here further than to say that it places the Erie Company substantially on an equal footing with the Columbus Company for the transaction of business at Cincinnati. Under said agreement the Erie Company is considered an initial road at Cincinnati, with the right to make rates on its own responsibility. The "joint depot master" at Cincinnati represents both companies without preference to either, and the Erie Company, as to all business to and from points beyond Dayton, including Cincinnati, is guaranteed uniform facili-

ties in every respect with the Columbus Company, the owner of the road. Under this agreement the locomotives and train hands of the Erie Company do not run beyond Dayton.

There is also an agreement in writing, a copy of which is on file with the Commission and which is likewise referred to, bearing date October 20, 1877, which regulates the interchange of business at Youngstown between the Pittsburgh and Lake Erie Railroad Company (hereinafter called the Pittsburgh Company) and the aforesaid Erie Company. This agreement gives the latter company control over the rates upon business to and from its line over the line of the Pittsburgh Company, and has been treated by both companies as entitling the Erie Company to designate the points for which its cars shall be loaded when on the line of the Pittsburgh Company and the character of business in which they shall be used.

On March 25, 1887, the Erie Company as lessee of the N. Y., P. & O. R. R., notified the Pittsburgh Company by letter that all existing rates to points off its lines were withdrawn, excepting as follows:

“Points on the N. Y., L. E. & W. R’y proper, east of Salamanca, will be considered as on our own line, as will also the points on the C., C., C. & I. R’y, between Dayton and Cincinnati, including the latter point.”

On April 1, 1887, the Erie Company, as such lessee, issued its freight tariff No. 1, from Youngstown to all points on its lines and on the C., C., C. & I. R’y between Dayton and Cincinnati, including Cincinnati, which provided that in the absence of a special tariff coal would take the sixth class tariff rate. The matter of a special coal tariff from points in the vicinity of Pittsburgh to points on the line of the Erie Company, lessee as aforesaid, was made the subject of considerable correspondence during the summer of 1887, particularly with reference to the divisions of the aggregate rates which would be allowed for bringing the coal upon the line of the Pittsburgh Company at various points. This resulted in the

issuing of a joint coal tariff by the Pittsburgh and Erie companies, taking effect September 26, 1887, from mines on various roads, including the Pittsburgh, Chartiers and Youghiogheny railroads, "to points on the New York, Lake Erie and Western railroad, lessee of the New York, Pennsylvania and Ohio railroad," including Cincinnati, to which point the rate was fixed at \$1.70 per ton of 2,000 pounds.

The equipment of the New York, Pennsylvania and Ohio Railroad Company, leased by the Erie Company as aforesaid, included at this time three thousand four hundred and forty-five gondola coal cars, which were very largely used between Pittsburgh and Cleveland, carrying coal towards Cleveland and ore towards Pittsburgh. In this traffic said cars were loaded in both directions, the ore being distributed to the furnaces in the vicinity of Pittsburgh and the cars then moved to the various coal mines in that region, where return loads were obtained for points on the line of the Erie Company, and especially for Cleveland. In October and November, 1887, this traffic was exceeding active and demanded more cars than said company was able to put into the service. Said gondola cars were also used to some extent for other business, such as limestone, iron pipe, etc., under instructions from the Erie Company regulating the extent of such use.

There was practically no coal traffic by rail from Pittsburgh to Cincinnati, for the reason above stated, and very little to points on the Erie road west of Akron, Ohio, except occasional shipments for gas purposes to Urbana, Springfield, Dayton, &c. Anthracite coal was taken in box cars over the Erie road to Cincinnati from points in Eastern Pennsylvania.

The mines on the line of the Pittsburgh, Chartiers and Youghiogheny railroad were supplied with cars by the Pittsburgh Company upon requisitions made by the dispatcher of the former road at Chartiers, who was accustomed to ascertain the number of cars needed on his line daily and order them in bulk from the Pittsburgh Company, the destination of the cars not being known by the latter company until they were received loaded at Chartiers.

Said joint tariff naming a rate of \$1.70 per ton on coal from points on the line of the Pittsburgh, Chartiers and Youghiogheny railroad to Cincinnati was in force on November 3, 1887, at which time one of the complainant firm, together with the owner of said Federal Springs mines, called on the general freight agent of said Pittsburgh Company, at Pittsburgh, for the purpose of making arrangements for the transportation of said coal which they had arranged to sell at Cincinnati. They inquired if coal could be shipped from said mines to Cincinnati, and he replied that he had no instructions to the contrary and knew of nothing in the way. They thereupon ordered cars for said purpose from the dispatcher of the Pittsburgh, Chartiers and Youghiogheny railroad, and several cars were furnished, loaded, and sent forward, consigned to Cincinnati. Ten of these cars went through and the freight at the tariff rate was paid at Cincinnati by the consignee.

About this time other shippers also desired to forward coal to Cincinnati and applied for cars for that purpose. Their application was referred to the Erie Company, which, on November 4, replied declining to allow cars to be loaded with coal for Cincinnati. At this time all other classes of merchandise were going forward from Pittsburgh to Cincinnati over this route as tendered. The Erie Company presently became aware of the coal shipments passing over its line from the Federal Springs mines to Cincinnati, and at once issued orders to stop all cars so consigned wherever they might be upon the route, and to load no more cars with coal for Cincinnati. Several cars so loaded and on the way were stopped at various points under this order, and not allowed to go through, the coal upon them being otherwise disposed of.

On November 8 complainants, by letter, applied to the Erie Company for cars, stating that the Pittsburgh Company had refused to load cars for Cincinnati, and requested ten cars a day. To this the Erie Company, on the 10th, replied that it had referred the matter to the general freight agent of the Pittsburgh road. Meanwhile, on the 9th, the same offi-

cer of the Erie Company had telegraphed the general freight agent of the Pittsburgh Company as follows:

“The C., C., C. and I. being blocked with bulk freight and that for delivery in Cincinnati yard they have declined receiving any more from us. Please see that no coal or other freight for yard delivery in Cincinnati is taken until notice.”

which was followed, on November 10, by the following telegram to the same officer:

“Please give the necessary ten days’ notice at once withdrawing all rates on coal to points on our line west of Akron.”

This request was repeated by wire the same afternoon and more urgently insisted upon; and on the same day a printed notice was issued by the Pittsburgh Company to the effect that on and after November 20, 1887, rates on coal to all points on or reached via the Erie Company west of Akron named in said joint coal tariff would be withdrawn. On the same day complainants exhibited to the agent of the Pittsburgh Company a letter from his consignee at Cincinnati containing the following:

“We have our own switches and unload all our stock from our own tracks; have room for over fifty cars. I have seen the C., C., C. and I. railway and have arranged with them to have all coal consigned to us come forward without delay. We will unload cars promptly; can use all you can ship at present; will want shipments shut off as soon as the water comes.”

Complainants also continued to apply to the officers of both companies for cars. On the 11th complainants observing that said notice withdrawing said coal tariff to points west of Akron did not take effect until November 20, tendered coal for shipment under the old rate until the ten days should expire. No cars, however, were furnished for this

purpose and no further shipments were made. On November 11 the general freight agent of the Erie Company wrote the Pittsburgh Company as follows:

“Referring to my notice to you to give ten days’ notice and withdraw all rates on coal in effect to points west of Akron on our line, after this time we will not accept less than our present sixth class per hundred pounds, copy of which I enclose you, from Youngstown to the points west of Akron on our own line, and you are at liberty, if you see fit, to publish a tariff upon this basis; but this must not be construed as giving you the privilege of loading our cars for these points; but if inquiry is made for shipments based upon these rates, we will take up the question and ascertain if box cars can be furnished; but under no circumstances could we furnish gondola cars.”

On November 12 he notified the Pittsburgh road by telegraph as follows:

“Shipments of bulk freight, etc., for Cincinnati yard delivery can now be resumed; but this must not be construed to mean that you can forward coal in gondola cars for Cincinnati delivery.”

Complainants afterward applied to the Pittsburgh Company for information as to what rate would be charged on coal to Cincinnati. Inquiry made by said company of the Erie Company was answered on November 16 by the following telegram from the latter company:

“I see no necessity for your inquiry in regard to the rate on coal for Cincinnati, as you have full advices as to just what we will do on this business.”

Whereupon the Pittsburgh Company notified the Federal Springs mines, on November 17, as follows:

“Best rate I can procure from N. Y., P. and O. R. R. is two seventy per ton, mines to Cincinnati. If you want to use this rate please let me know, and I will ask them if they will furnish cars at this figure.”

Said rate of \$2.70 per ton was the regular sixth class tariff rate then in force. During this time the rate from Pittsburgh and vicinity to Cincinnati via the Pennsylvania and the Baltimore and Ohio lines was \$1.70 per ton; but those lines were not available for shipments from the mines in question. On defendant's line the rate from said mines to Cleveland is ninety cents per ton; the distance from Pittsburgh to Cleveland is 135 miles, and the distance from Pittsburgh to Cincinnati is 368 miles.

It is customary generally, as well as on the defendant roads, to transport coal at a special or commodity rate.

Upon these facts the complainants insist that the defendants unjustly discriminated against them in favor of other shippers, in failing and refusing to furnish cars and transport their coal to Cincinnati, whereby the complainants were subjected to undue and unreasonable prejudice and disadvantage, to their great pecuniary loss.

It is obvious that this case materially differs from the case of the same complainants against the Pittsburgh and Lake Erie Railroad Company heretofore decided by the Commission (1 I. C. C. Rep., 374). In that case the proposed shipments were to be consigned to Buffalo, and the Lake Shore and Michigan Southern Railroad Company, over which the coal was to be transported from Youngstown and which was entitled to fix the rate and to direct the movement of cars on the line in question was not a party to the proceedings before the Commission. Other distinctions also exist, but the above fact was of itself sufficient to disentitle complainants to relief, even if the charge of unreasonable preference had been made out upon the facts. (See same case on motion for re-argument, 1 I. C. C. Rep., 490.)

In the present case the same ruling is invoked upon the ground that Cincinnati is not upon the line of defendants' roads, but is on the line of the C., C., C. and I. railway fifty-six miles beyond Dayton. An examination of the contract between the Erie and Columbus companies above referred to, and the working thereof, shows, however, that Cincinnati is treated for all practical purposes as a point upon the line of

the Erie Company. The leading object in view in said agreement obviously was to place the Erie Company upon an equality with the Columbus Company in respect to all business to and from Cincinnati, both passenger and freight, and that equality appears to have been adequately established by the terms of the instrument. The Erie Company is substantially as well accommodated in its competition for business to and from Cincinnati as it would be by an independent line of road under its own exclusive control. Rights, powers and privileges like those obtained under said contract involve and impose corresponding obligations. If, as between the roads, the Erie Company is "to be treated as an initial company entirely independent of the Columbus Company in soliciting business," with the right to make its own rates, its own agreements for interchange of traffic with connecting roads, etc., it cannot properly claim to take any different position as between itself and the public. Pursuant to the rights secured under said agreement the Erie Company names Cincinnati upon its time tables and its tariffs in the same manner as it treats points situated upon its main line. It consigns freight of all classes to that city in its own cars and upon its local freight tariff. In naming rates from Youngstown and elsewhere it includes all points from Dayton to Cincinnati, inclusive, in precisely the same way as points north of Dayton are named, and it is largely for its advantage to be able to so treat those points. Advantages, however, often involve correlative duties, and we should be doing violence to the established facts if we were to treat Cincinnati otherwise than as a point upon the line of the Erie Company for the purposes of this proceeding.

The course taken by the defendants in respect to the matters above stated was personally directed by the general freight agent of the Erie Company in charge of the freight traffic of the New York, Pennsylvania and Ohio railroad. He was a witness on the hearing before the Commission. His testimony was to the effect that in November, 1887, his road was not able to meet the demands of its "regular patrons" for cars, and that the use of any part of the equipment of the line for carrying coal to Cincinnati would have been disas-

trous to other interests by reason of the time which would necessarily be consumed by the cars in going and returning. He explained that by "patrons" he did not refer simply to people doing business on the line of the Erie road, but also to shippers of coal in the vicinity of Pittsburgh who were dependent upon the cars of the Erie for transportation, which were furnished "to the Pittsburgh and Lake Erie to distribute to our patrons there;" which cars were rapidly moved between Cleveland and Pittsburgh carrying coal and ore in the manner above described. He apparently acted upon the idea that he was entitled to look out for the needs of shippers who had an established business and course of traffic over his line in preference to the requirements of an occasional shipper or of one whose dealings might be limited in extent and were sure to terminate soon.

This, in short, is a claim that regular customers are entitled to preference over occasional customers. It was supported by abundant proof that the opportunity for profitable shipment of coal to Cincinnati was exceedingly unusual and might never occur again.

This claim, supported by this fact, presents no justification for the refusal to undertake the carriage of the coal. A common carrier is under obligation to serve the public equally and justly; it is unlawful for him "to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic in any respect whatsoever." He must know no friends and concede no unequal favors. The opportunity for profit of a stranger in a single and unusual transaction should be held as important by the carrier as the traffic of a constant shipper; no preference should be given to either. It is the duty of a common carrier to provide adequate equipment for the business of his line; if in time of special pressure some one must wait, the annoyance must be distributed with all possible equality. It is in contravention of the statute for a common carrier to refuse a shipment upon the ground that regular patrons desire to use all the facilities at hand, and to appropriate to the uses of the latter the entire available equipment.

It is not necessary for a shipper to make a special contract with a common carrier in order to entitle himself to transportation for his goods. A common carrier, by virtue of his assuming that position and thereby becoming entitled to the privileges, liens, and protections given by statute and at the common law, becomes at the same time bound to carry the merchandise of all, for a reasonable reward, whenever tendered in the usual way. The difference between a common carrier and a private carrier consists largely in that obligation, which arises without special agreement. The compensation of the common carrier is assured to him by a lien upon the goods, a right which is not enjoyed by a private carrier; in case the articles tendered for transportation are not surely worth the freight money his right to demand payment in advance has long been recognized; his interests are well protected in every direction, and he has no right to refuse to accept for transportation, at a reasonable rate, any article of such a nature as he is accustomed to transport, from any person seeking the service.

The Act to regulate commerce requires that a tariff for the transportation of merchandise be established by interstate common carriers, and that the charges shall be reasonable and just. Every description of merchandise is included within the protection of this provision of the law. Common carriers have no right to withdraw from the transportation of any articles not dangerous to handle and which are ordinarily the subject of transportation by them. Less desirable traffic must be accepted upon reasonable terms as well as that which is more desirable. In this matter as in many others the principles of the Act to regulate commerce in prohibiting undue and unreasonable preferences and advantages are simply declaratory of the common law. The common carrier has no right to select either goods or customers. In the present case the commodity in question is one of the chief articles transported upon defendants' lines, and the points between which its movement was desired are points between which general business is solicited; yet the witness testified that his road is not engaged in carrying coal and ore into Cincinnati. His tariff sheet in this respect was better

than his practice, for a reasonable rate to Cincinnati on coal was announced in a formal joint tariff to which the Erie road was a party, and when coal was offered for shipment thereunder the party tendering it was as much entitled to have it transported as was any mine owner or shipper of coal in the Pittsburgh region.

It was the duty of the carrier to make every reasonable exertion to get it forward without unjustly prejudicing the rights of others in respect to the freight which each contemporaneously tendered.

It is not meant by this that the Erie Company was bound to furnish gondola cars for this shipment, but it was bound to make an effort to furnish some sort of cars to move the coal, either gondolas or others. It refused wholly to do anything; it had a large equipment aside from its gondolas; it made no effort to appropriate any other cars to this service or to obtain cars elsewhere. It does not appear that complainants had any preference as to what kind of cars were furnished if only the coal could go forward. At the end of one of their letters demanding cars, they said that gondolas were what they wanted, obviously meaning that the service required was that to which gondolas were customarily appropriated, but it was not their duty to demand other cars if defendants refused the use of a fair distributive share of gondolas; in such case it was not complainants' but defendants' business to look up other vehicles of carriage.

The real reason why gondolas were refused to complainants for the tendered shipments to Cincinnati was no doubt correctly stated by said general freight agent in his testimony, as follows:

"Q. Then, do I understand you refused gondola cars for the transportation of coal to Cincinnati because you needed them in this trade you have already mentioned?

"A. Yes; we refused them because we needed them in this trade, and were able with a smaller number of cars to take care of a larger number of shippers and consignees by having the cars within our own control."

The trade referred to was the carrying of ore from Cleve-

land to Youngstown and Pittsburgh and coal from the vicinity of those places to points on the Erie road east of Akron.

The explanation amounts to this: That he refused to permit gondolas to carry this coal because he could make more money by using them on the eastern portion of his line, where return loads of ore were obtainable and where more frequent trips could be made; thus enabling him to serve a larger number of customers with a smaller number of cars. It needs no argument to show that this reasoning presents no excuse for rejecting complainants' business; and while refusing gondolas for this reason, the general freight agent made no effort to supply their place in any other form, but simply refused the shipment.

He repudiated his own joint tariff and ordered the ten days' statutory notice of its cancellation to be given. The notice as issued allowed nine days only. Even during the period limited, while the tariff was in actual existence, he refused the shipment except at the sixth-class rate, demanding \$2.70 per ton for service which his tariff offered to perform for \$1.70 per ton, and going so far as to say that he would not agree to take the shipment at the advanced price, but if coal should be offered under it he would take the matter up and see what could be done about cars; his gondolas should not go to Cincinnati under any consideration; yet he must have known that no coal would be moved under the proposed \$2.70 rate, and that his refusal to recognize his tariff was causing considerable pecuniary loss to the complainants, who were thus deprived of an unexpected opportunity of profit to be made by the delivery of coal at an unusual market during the period of low water in the river. He went so far as to stop freight in transit which had been regularly billed and accepted for transportation over his line. He criticised his associates in the Pittsburgh Company for letting the coal go out at all under their joint tariff, and at the same time he referred complainants for information to the same parties. He seems to have regarded the joint tariff as established for ornamental purposes only. The very proper effort of the Pittsburgh Company to carry the traffic during the period limited for the termination of the rate was repu-

diated. The block in the yard at Cincinnati from November 9th to 12th was no more an excuse for refusing coal shipments than for refusing shipments of other merchandise after the difficulty had been removed. The Erie Company has no right to refuse transportation of coal from the Pittsburgh region to one part of its line, while encouraging the same traffic in every way from the same region to another part of its line. In like manner it has no right to accept and solicit traffic of every other nature from Pittsburgh to Cincinnati and at the same time refuse to carry coal between the same points.

The conduct of the Erie Company in this matter operated directly to give an undue and unreasonable preference to the shippers whose coal was carried during the period in question, and to subject the complainants at the same time to undue and unreasonable prejudice and disadvantage, in contravention of the provisions of section three of the Act to regulate commerce.

It is obvious that an unremunerative and undesirable traffic can be put an end to by announcing a prohibitory rate as effectually as by refusing to accept the business.

On the other hand it is also obvious that, by reason of distance, proximity of other producers of the same article, necessary expense of transportation, available competing water routes, or other causes, it may often be true that a perfectly just and reasonable rate will be too high to permit the profitable movement of a commodity over a given railroad line; and therefore the fact that the article cannot be shipped at the rate named is by no means conclusive evidence that the rate is unreasonable.

As the opportunity for shipping coal to Cincinnati has passed, no useful order can now be made in respect to the future. No examination has been entered upon concerning the reasonableness of the tariff now in force and no opinion is expressed upon that question.

The Commission has repeatedly held that it can make no award of damages in a case like the present, for the reason that the defendants are entitled to have the amount assessed by a jury.

An order will be entered declaring and adjudging that the defendants have violated the provisions of the Act to regulate commerce in refusing to furnish complainants a fair proportion of cars and to transport the coal tendered for carriage from the Federal Springs mines to Cincinnati at the tariff rate of \$1.70 per ton up to November 20, 1887.

**RIDDLE, DEAN AND COMPANY, *Petitioners*, v. THE
BALTIMORE AND OHIO RAILROAD COMPANY,
Defendant.**

Heard February 1, 1888.—Decided February 23, 1888.

I. A statement of the evidence from which it appears that it was the duty of the Yough Slope mine, its owners and agents, to have enquired of the station agent of the railroad company near by the mine on the 30th day of August, 1887, and on the next day, by which they would have learned that the mine could have obtained cars for the shipment of coal to Arthur and Boylan at Cleveland, Ohio, and they having failed to do this, in consequence of which the Youghiogheny and Ashtabula mines received nearly all these cars for this purpose, without any partiality or preference on the part of the railroad company.

Held upon these facts that a complaint of unjust discrimination against the Yough Slope mine, and in favor of the Youghiogheny and Ashtabula mines cannot be sustained.

II. Where a complaint is made by a shipper that an unjust discrimination was perpetrated by a railroad company against him at a particular time named, in a case like the present, to rebut the inference arising from circumstances, calling for explanation, amongst other evidence, the carrier may show that during a long course of business neither it nor any of its agents have ever shown any unfriendly spirit whatever toward the shipper, and that, on the contrary, its agents immediately before the matter complained of made extra exertions in good faith to serve the shipper in obtaining cars for him from the connecting line to which the shipper had to look for such cars.

III. In the absence of some custom and rule of business placing such duty upon the carrier to notify the shipper without enquiry on the part of the latter of the fact that he can then obtain cars for the movement of his freight, it is the duty of the shipper by reasonable enquiry made to the proper agent of the railroad company, to obtain this information for himself; but in a case like the present, if the carrier took upon itself the duty of actually notifying the Youghiogheny and Ashtabula mines

on the 30th of August, 1887, without waiting for any enquiry on their part, that they could get cars, then, in like manner, it was its duty to have notified the Yough Slope mine at the same time that it could get cars.

Held, that, tested by these rules, no case of preference or unjust discrimination is made out by the evidence in favor of the Youghiogheny and Ash-tabula mines and against the Yough Slope mine.

J. L. Black, Esq., counsel for petitioners.

John K. Cowen, Esq., and *H. L. Bond, Esq.*, counsel for defendant.

REPORT AND OPINION OF THE COMMISSION.

BRAGG, *Commissioner* :

The complaint in this proceeding charges that the Baltimore and Ohio Railroad Company does not give the mines represented by petitioners their proportion of cars each day, and that this company unjustly discriminates against them in furnishing cars to others.

The complainants are sales agents of the Yough Slope mines, situated near West Newton, on the Baltimore and Ohio railroad. These unjust discriminations are charged to have been committed during the month of August and the early part of September, 1887, namely, commencing with the 10th of August and ending with the 3d day of September following, on cars that should have been furnished for shipments of coal from said mine to Arthur & Boylan at Cleveland, Ohio. Various exhibits are attached to the petition in the shape of correspondence relating to these alleged discriminations, and also lists of cars which it is claimed were furnished to the Yough Slope mine and to other adjacent mines during the period to which the complaint refers.

The answer of the Baltimore and Ohio Railroad Company neither admits nor denies that the complainants were sales agents for the Yough Slope mine, or that on August 10, 1887, they received an order to ship five cars per day to Arthur & Boylan, of Cleveland, Ohio. It admits the receipt of memorandum, copy of which is filed with complaint, marked Exhibit No. 2, but states that in the distribution of coal cars to the mines along the line of its road it has necessarily to deal

directly with the mines and cannot recognize or notice the orders of third parties, the practice being that each mine makes out a daily requisition for such cars as it needs on blanks furnished by the railroad company for the purpose. It states that all the cars used for shipments of coal from mines on the lines of its road over the Pittsburgh and Western railroad to Cleveland are owned by the Pittsburgh and Western Railroad Company or its leased lines, and that the Baltimore and Ohio Railroad Company in distributing those cars to the mines acts only as the agent of the Pittsburgh and Western Railroad Company and under its direction; that the route for coal from mines on the respondent's road to Cleveland for Pittsburgh and Western cars is by way of the respondent's road to Pittsburgh, the Pittsburgh Junction road to Allegheny City, the Pittsburgh and Western road to Akron, and the Valley railway to Cleveland.

There is, however, direct delivery by the Baltimore and Ohio railroad to the Pittsburgh and Western railroad on the line of the Junction road. The Pittsburgh and Western railroad and the Valley railway are distinct and independent roads, and in no way controlled by the Baltimore and Ohio Railroad Company. It states that on the 10th of August, 1887, it had previously received an order, then in force, from the Pittsburgh and Western Railroad Company to allow no cars belonging to the Pittsburgh and Western Railroad Company to be loaded with coal for Cleveland; that on the 19th of August, at the instance of the Yough Slope mine, D. C. Bachelor, train-master of the respondent, endeavored to have the standing order referred to revoked as to the Yough Slope mine, and for that purpose sent to J. T. Johnson, the superintendent of the Pittsburgh and Western railroad, a telegram in the following words:

"Can coal for Pressly & Arthur and Arthur & Boylan, Cleveland, go forward from Yough Slope? Answer quick?"

To which telegram the following answer was received from Superintendent Johnson:

"No, sir; I cannot take coal for Presley & Arthur or Ar-

thur & Boylan until further orders. Do not allow any of our cars to be loaded with coal or slack unless you have immediate shipment for it."

That all of the respondent's dealings in regard to the business between the mines on its road and Cleveland were carried on directly with the Pittsburgh and Western Company; that it has no direct dealings with the Valley Railway Company in regard to such business. The respondent cannot, therefore, state with certainty whether the orders as to the shipments of coal to Cleveland above stated were made by the Pittsburgh and Western Company on its own motion or whether they were directed by the Valley railway; but it is informed and believes that such orders were at least in part dictated by the Valley Railway Company. The order of August 19, 1887, contained in the telegram last quoted, was not revoked until August 30, when Train-Master Bachelor received the following telegram from Superintendent Johnson:

"Please send along Arthur & Boylan coal. Valley will receive it."

It denies that it in any way discriminated or intended to discriminate against the Yough Slope mine in the distribution of cars for the shipment of coal to Arthur & Boylan and other consignees in Cleveland, but alleges that, on the contrary, it did not distribute any cars to any mines on its road for the purpose of making Cleveland shipments, and it could not do so against the orders of the Pittsburgh and Western Railroad Company, which was the owner of the cars; that in regard to the comparison made in the petition filed in this matter between the cars furnished the Yough Slope mine and those furnished the Youghiogheny and Ashtabula mines the respondent says that such a comparison is unjust and misleading as made in the petition; that, as appears by the petition itself, the Yough Slope mine had orders for but five cars a day to be shipped over the Pittsburgh and Western railroad, and those five cars were for Cleveland shipments. The Youghiogheny and Ashtabula mine, on the

other hand, was a large shipper, not only to Cleveland, where its consignees were Arthur & Boylan and Presley & Arthur, but also to Fairport, a point on the Pittsburgh and Western system. Its orders for shipments over the Pittsburgh and Western railroad were some twenty-five cars a day or five times that of the Yough Slope mine. The shipments made by the Youghiogheny and Ashtabula mine, as well as those by the Yough Slope mine, consigned to Arthur & Boylan at Cleveland, between August 20 and August 30, inclusive, were made despite the orders to the contrary issued by the respondent under the instructions issued by the Pittsburgh and Western Company. The cars so loaded were furnished with instructions that they should not be loaded for Cleveland, but both mines in question did load coal from their mines for Cleveland as shown by Exhibit No. 12, filed with the petition. The respondent took the cars so loaded and delivered them to the Pittsburgh and Western railroad, but whether they were transported by that road respondent is unable to say. It admits that Exhibit No. 12, filed with the petition is a correct statement of the number of cars shipped by the different mines consigned to Arthur & Boylan at Cleveland, with the exception that the number of cars loaded on September 3 for the Yough Slope mine should be five instead of one. The number of Pittsburgh and Western route cars shipped by the Yough Slope mine from August 29 to September 3 was twenty-three instead of sixteen, as appears by Exhibit No. 12.

It avers that the owners of the Yough Slope mine do not have or claim to have any complaint or grievance against this respondent in regard to the distribution of cars to that mine, and that said owners have no interest in nor do they approve of the present proceeding, as will appear by letter dated October 31, 1887, from R. H. Lattimore, general manager of the Yough Slope mine, addressed to Mr. J. V. Patton, superintendent of the Baltimore and Ohio railroad, Pittsburgh, Pennsylvania, a copy of which is attached to respondent's exhibit as an exhibit.

It alleges that on the 10th of October, before the filing of this petition, the order of Arthur & Boylan for five cars per

day referred to in the petition was revoked. The respondent therefore alleges that, having satisfied the owners of the Yough Slope mine that there was and is no discrimination or intention to discriminate, as appears by the letter referred to, the present petition should be dismissed by this Commission and the petitioners be relegated to their remedy by suit at law, if any they have.

At the hearing it was agreed between the counsel of the parties that the grievances complained of should be confined to the period between the 30th of August and the 4th of September, 1887. This, of course, greatly narrowed the investigation. Evidence was permitted to be introduced as to the dealings of the parties from the middle of June, 1887, relating to the furnishing of cars by the respondent to the Yough Slope mine and other mines along its line for whatever light, if any, this might throw upon what occurred during the period complained of. By the agreement of counsel above mentioned it was conceded that the respondent had satisfactorily explained to the petitioners all the alleged grievances mentioned in the complaint, except those averred to have occurred between the 30th of August and the 4th of September, 1887.

From the evidence before us we find the material facts to be that the Yough Slope mine is in the State of Pennsylvania, and is situated on the Pittsburgh Division of the Baltimore and Ohio railroad, near West Newton, about thirty-three miles south of Pittsburgh. The Pittsburgh Division of the Baltimore and Ohio railroad extends from Cumberland, in the State of Maryland, to Pittsburgh, in the State of Pennsylvania, a distance of one hundred and fifty miles. Near the Yough Slope mine are the Youghiogheny and Ashtabula mines and numerous other mines situated upon the Pittsburgh Division of the Baltimore and Ohio railroad, in the State of Pennsylvania.

The route by which coal is carried over respondent's railroad to Cleveland, in the State of Ohio, is by the Baltimore and Ohio railroad to Pittsburgh, a distance of about 33 miles; by the Pittsburgh Junction railroad to Allegheny City, a distance of 4.47 miles; by the Pittsburgh and West-

ern railroad from Allegheny City to Akron, Ohio, a distance of 135.3 miles, and by the Valley railroad from Akron to Cleveland, a distance of 35 miles. The Pittsburgh Junction railroad is a mere link of connection between the Baltimore and Ohio railroad and the Pittsburgh and Western railroad, and they pay to it \$2 for each loaded freight car received by or delivered to them over its line, which rate, it is provided by the contract, may be less if the earnings of the Pittsburgh Junction railroad exceed a certain amount named in the contract. The Pittsburgh and Western Railroad Company and the Valley Railroad Company are each separate, distinct, and independent corporations. The Pittsburgh and Western railroad extends from Allegheny City, in the State of Pennsylvania, to Orville in the State of Ohio, a distance of 160 miles, and it has what it calls its Lake Division, extending from Niles, in Pennsylvania, to Painesville, in the State of Ohio—virtually at Fairport, on Lake Erie—a distance of 51 miles. The distance from Allegheny City to Niles on the Pittsburgh and Western railroad is $85\frac{1}{2}$ miles. The Pittsburgh and Western railroad also has what is called its Northern Division, extending from Callery Junction, in Pennsylvania, to Mount Jewett in the State of Pennsylvania. The Valley railroad extends from Cleveland, Ohio, to Valley Junction in the same State, a distance of 75 miles, and crosses the Pittsburgh and Western railroad at Akron.

We find on file in our office the Baltimore and Ohio Railroad Company's through coal tariff No. 1, taking effect April 1, 1887, which embraces through rates on coal from the mines mentioned to Cleveland, Fairport, Cuyahoga Falls, Girard, Monroe Falls, and a large number of other points east and west of these mines. We also find on file in our office a supplement, No. 3, of the Baltimore and Ohio Railroad Company to the above through coal tariff No. 1, published April 25, 1887. These tariffs are still in force. We find no joint coal tariffs existing between the Baltimore and Ohio Railroad Company, the Pittsburgh and Western Railroad Company, or between either of these and the Valley Railroad Company; nor do we find joint tariffs or joint agreements of any kind between any of these three last-named

railroads, and the evidence shows nothing of the kind, and although it may be probable that some arrangements of this character exist between them, yet, in the absence of evidence on the subject, we are not authorized to find such to be the fact.

This, however, was not the only route by which the mines mentioned in the complaint might have shipped coal to Cleveland during August and the early part of September, 1887, for they might have shipped by the Baltimore and Ohio and the Pittsburgh and Lake Erie railroad and the New York, Pennsylvania and Ohio railroad, but this would have involved extra switching charges.

The petitioners, Riddle, Dean & Co., reside at Pittsburgh, and during the summer and fall of 1887 were sales agents of the Yough Slope mine in finding markets and purchasers for its coal. Through their efforts and negotiations about the middle of June five car loads of coal from this mine were shipped to Arthur & Boylan, large coal dealers in Cleveland, as a sample lot. Under a contract or arrangement to this effect subsequent lots of coal from this mine were shipped to Arthur & Boylan, at Cleveland, at intervals during the period intervening between the first shipment and the 19th of August. On the 19th of August and for a short period prior thereto there had been a direct order in force to the Baltimore and Ohio railroad from J. T. Johnson, superintendent of the Pittsburgh and Western railroad, not to allow any coal cars to go forward to Cleveland until further notice.

On the 19th of August D. C. Bachelor, train-master of the Baltimore and Ohio Railroad Company, telegraphed J. T. Johnson, superintendent of the Pittsburgh and Western Railroad Company:

“Can coal for Presley & Arthur and Arthur & Boylan, Cleveland, go forward from Yough Slope? Answer quick.”

To this telegram on the same day Superintendent Johnson replied by telegram:

“No, sir; I cannot take coal for Presley and Arthur or Arthur & Boylan until further notice. Do not allow any of

our cars to be loaded with coal or slack unless you have immediate shipment for it."

Again, on the same day, a telegram was sent from the office of the superintendent of the Pittsburgh and Western Railroad Company to Bachelor:

"Pressly & Arthur and Arthur & Boylan have on hand at this writing 27 cars of B. & O. coal; do not think it advisable to receive shipments for a few days; will advise you."

Under these orders and instructions coal did not go forward from the mines along the Baltimore and Ohio railroad (the Yough mine included) until the 31st of August.

On the 23d of August, 1887, petitioners wrote a letter to Arthur & Boylan, Cleveland, Ohio, in which they say:

"Owing to the B. & O. R. R. and Valley railway refusing to receive any more coal for you we will ship you about 20 cars via N. Y., P. & O. route. We will pay switching on same. What is wrong? Are you blocked?"

To this Arthur & Boylan, by letter of date August 25, 1887, replied:

"Yours of 23d received, and in reply would say the Valley R. R. say they have not stopped any of our coal. Do not ship us any coal via N. Y., P. & O."

On the 30th of August a telegram was sent by Superintendent Johnson, of the Pittsburgh and Western Railroad Company, to D. C. Bachelor, train-master of the Pittsburgh Division of the Baltimore and Ohio railroad:

"Please send along Arthur & Boylan coal; Valley will receive it."

During the afternoon of the 30th of August the following telegram was sent by Bachelor to all the depot agents for all of the mines along the Pittsburgh Division of the Baltimore and Ohio railroad:

"Coal for Arthur & Boylan can now come forward."

Under date of August 30, 1887, at Allegheny, Superintendent Johnson wrote petitioners the following note:

"I received a message this a. m. from Superintendent Smith, of the Valley, after departure of your representative, saying they would receive coal for Arthur & Boylan, and immediately notified the Baltimore and Ohio to let it come forward."

This note was received that day by petitioners, and was immediately forwarded by them to R. H. Lattimore, general manager of the Yough Slope mine, at West Newton, Pennsylvania.

Hearing of no coal shipped, as they would in the ordinary course of business, if any had been forwarded, at noon on the 2d of September, W. H. Riddle, of the firm of Riddle, Dean & Company, took a train from Pittsburgh to the Yough Slope mine, which is only a short distance, and went there. After conferring with Lattimore and finding that the Yough Slope mine had received no cars the two went together to the Youghiogheny and Ashtabula mines, which are near by, and there found the sidings of the Youghiogheny and Ashtabula mines filled with cars. At that time the Yough Slope mine had only one car of the Pittsburgh and Western railroad. The next day Riddle went to the Way-Master's books, from which he obtained a statement of the cars shipped from the Yough Slope, Youghiogheny, and Ashtabula mines, respectively, during the period between the 30th of August and the 3d of September. From this statement, which is in evidence before us, it appears that during that time the Yough Slope mine, while ordering 85 cars, received only 6 cars, and the Youghiogheny and Ashtabula mines, ordering 80 Western cars, received 48.

The manner in which mine owners are furnished cars for the shipment of coal by the Pittsburgh Division of the Baltimore and Ohio railroad is shown by the evidence. Each agent and each mine owner is furnished blanks, and at four o'clock each afternoon they fill in the blanks—the number of cars on hand loaded and ready for forwarding, the amount on hand for the morrow's haul, and how many cars they require. This information is telegraphed to the superintendent of the railroad, and the original order follows by mail to

confirm the telegraphic request. This is condensed by the car distributor, and during the night the empty cars are distributed to the various mines, according to instructions.

It is an event of frequent occurrence for the mines to alternate in receiving cars during the season—that is, one mine for two or three days will have no cars and then the next succeeding several days it will have abundance of cars, and this method is said to be more economical for the miners and to be preferred by them. Another phase of this business is that mine owners frequently, when cars are scarce, call for twice as many cars as they really need in order, as they say, that they may be sure to get enough, and this was done often by the Yough Slope mine during the month of August, 1887, as its general manager, Lattimore, who is also owner of a one-fourth interest in the Yough Slope mine, admits as a witness on the stand. He admits that while the Yough Slope mine was calling on the Baltimore and Ohio Railroad Company for twenty and twenty-five cars a day from the 15th of August to the last of that month this mine did not really need and could not use more than one-half that number. He also admits that he occasionally preferred not to have cars for two days at a time, because it was more economical for him to do so, and that this was so understood and agreed on between him and the authorities of the Baltimore and Ohio Railroad Company. While admitting all his fault-finding complaints to his agents, the petitioners, against the Baltimore and Ohio Railroad Company, as shown in evidence, he now says, as a witness on the stand, “that take the season through we received as many cars as our neighbors ;” and again, “during the whole season we were treated very well. There was no complaint to make.” Referring to what occurred between the 30th of August and the 4th of September this witness testifies :

“I do not consider we were discriminated against. I consider it an oversight that the agent did not notify me until the fourth morning the embargo was raised.”

During the summer of 1887 the capacity of the Youghiogheny and Ashtabula mines was about twice as great as that of the Yough Slope mine. In the same period the shipments

of coal from the Yough Slope mine were largely to Cleveland, over a route in which there was very frequent trouble to obtain cars, while the shipments of coal from the Youghiogheny and Ashtabula mines were chiefly to Fairport, over a route in which there was no trouble about a sufficiency of cars. The general manager of the Yough Slope mine, Lattimore, testifies that for this reason Mr. Day, whom we suppose from the connection in which his name occurs was an officer connected with the Baltimore and Ohio Railroad Company, advised the witness to ship his coal to Fairport, where he could get plenty of cars and have no trouble; but Lattimore testifies he was anxious to introduce his coal in the Cleveland trade.

To negative the idea of unjust discrimination during the period complained of, between the 30th of August and the 4th of September, as far as this might, if at all, the Baltimore and Ohio Railroad Company introduced in evidence statements of the cars it furnished during the period from the 15th of August to the 3d day of September, 1887, to these respective mines on east and west bound shipments. From these it appears that of the total cars furnished during this last period the Youghiogheny and Ashtabula received 203 cars and the Yough Slope mine received 146, divided as follows :

West-Bound Shipments.

Youghiogheny and Ashtabula.....	163 cars.
Yough Slope.....	57 “

East-Bound Shipments.

Youghiogheny and Ashtabula.....	40 cars.
Yough Slope.....	89 cars.

On shipments of coal to Cleveland during this same period last referred to the cars furnished the mines were as follows :

Youghiogheny and Ashtabula.....	36 cars.
Yough Slope.....	33 “
Republic.....	40 “
West Newton.....	15 “
Amirville.....	8 “
Osceola.....	26 “
Eureka.....	1 “

To further negative any inference of unjust discrimination upon the facts as far as this might do, if at all, the Baltimore and Ohio Railroad Company shows by the evidence that during the month of August, 1887, and the period to which this complaint relates, owing to the amount of business it had to do upon its own line and the amount of its car equipment in use for that purpose on its Pittsburgh Division, that it could not and did not permit its cars to go away from its own line to carry coal for any shippers, and that during that time coal from these mines to Cleveland had to be transported in the cars of the Pittsburgh and Western Railroad Company, which were used for that purpose, and that in distributing these cars among the mines along its Pittsburgh Division the respondent did so as the agent of the Pittsburgh and Western Railroad Company, and in making this distribution divided these cars among the mines ratably, fairly, and without preference to any one mine over another. The cars of the Valley Railroad Company do not appear to have been used in this business during last season, though prior to that time they had been.

The question to which our conclusions must be directed upon this evidence is whether, in violation of the Act to regulate commerce, the Baltimore and Ohio Railroad Company was guilty of unjust discrimination in failing to furnish cars to the Yough Slope mine between the 30th of August and the 4th of September, 1887, for shipments of coal to Arthur & Boylan, at Cleveland, Ohio, and during that period unjustly discriminated in favor of the Youghiogheny and Ash-tabula mines by furnishing cars to them. This is the only issue in the proceeding.

The cars to be furnished were the cars of the Pittsburgh and Western Railroad Company, and they were to be distributed to these mines by the Baltimore and Ohio Railroad Company. An embargo, as it is called by the witnesses, had been existing from August 19 to August 30, during which time no cars were furnished by the Pittsburgh and Western Railroad Company to the respondent for the shipment of coal from these mines to Cleveland, Ohio. The embargo itself is not now made a subject of complaint in this proceed-

ing, and the agreement of the counsel of the parties at the hearing concedes that it has been accounted for to the petitioners upon grounds that are satisfactory to them. On the 30th of August this embargo was raised by a telegram from Johnson, superintendent of the Pittsburgh and Western Railroad Company, to Bachelor, master of trains of the Baltimore and Ohio Railroad Company, informing the latter that coal shipments to Arthur & Boylan, Cleveland, Ohio, could then come forward. On the same day Johnson, at Allegheny, wrote a note to petitioners at Pittsburgh, as agents of the Yough Slope mine, giving them the same information, and this note was at once forwarded by them to Lattimore, general manager of the Yough Slope mine at West Newton. As soon as Bachelor received Johnson's telegram he at once telegraphed to all the depot agents for the mines along the Pittsburgh Division of the Baltimore and Ohio Railroad Company: "Coal for Arthur & Boylan can now come forward." It appears that the Youghiogheny and Ashtabula mines received this information and sent in their requisitions for cars, and were at once furnished; but it also appears that the Yough Slope mine either did not receive this information promptly or did not act on it until the 4th of September.

The evidence as to the time when the Yough Slope mine first received intelligence that the embargo was raised and that coal for Arthur & Boylan could go forward is peculiar. It is certain that on the 30th of August petitioners mailed to Lattimore, general manager of the Yough Slope mine, the letter of the superintendent of the Pittsburgh and Western Railroad Company, by which he would have learned that the embargo was raised and that coal could then go forward for Arthur & Boylan. That letter Lattimore should have received the night of the 30th of August or the next morning, yet, when Lattimore was a witness on the stand, he does not state when he received that letter or that he ever received it at all. The superintendent of the Pittsburgh Division of the Baltimore and Ohio Railroad Company, as a witness on the stand, testifies that as soon as it was known by him Bachelor that the embargo was raised, at once a teleg

was sent to all the depot agents for the mines along his division that coal could then come forward for Arthur & Boylan. If neither Lattimore, the general manager of the Yough Slope mine, and none of his subordinates received the notice contained in this telegram he should have so testified on the stand; but when he was on the stand as a witness he neither expressly admits nor denies that the notice in this telegram was received by him or some of his subordinates earlier, but leaves the inference to be drawn that it was not by saying:

“I do not consider we were discriminated against. I considered it an oversight that the agent did not notify me until the fourth morning that the embargo was raised.”

The inference is that “the agent” to whom he refers was the depot agent of the Baltimore and Ohio Railroad Company at West Newton station. If on the night of the 30th of August or the next morning Lattimore received the letter of Johnson forwarded to him by petitioners he then knew that the embargo was raised, and he was not bound to wait on the agent, but it was his duty to have at once telegraphed for the cars needed for his mine and have forwarded its requisition, but he did nothing of the kind. Certainly William H. Riddle, one of the petitioners, must have informed Lattimore during the afternoon of the 2d of September that the embargo was raised, and he should have then telegraphed for the cars needed for his mine and have forwarded its requisition, but it does not appear he did so. It is a familiar rule of law that a party who has been injured by another in such way as is here claimed must not make the matter worse by failing to perform a plain and obvious duty on his part and then make the damage added by his own negligence or recklessness a ground of complaint.

The embargo had been prevailing for eleven days on shipments of coal to Cleveland from all these mines by way of the Baltimore and Ohio, the Pittsburgh and Western and the Valley railway up to the 30th of August, when it terminated. If there was any custom or course of business by which it became the duty of any agent of the Baltimore and Ohio Railroad Company to notify Lattimore, as general manager of the Yough Slope mine, of the fact that this embargo had

ended without waiting for any inquiry upon the subject from Lattimore or some agent of the Yough Slope mine this should have been shown by the evidence, and the burden of proof was on petitioners to show it; but there is no evidence of any such custom or course of business. In the absence of any such evidence the act of any of the agents of the Baltimore and Ohio Railroad Company in notifying Lattimore that the embargo had ended would seem to rest alone upon the idea that having sent notice of this fact to depot agents of the other mines the Baltimore and Ohio Railroad Company should, as a matter of fairness, have in a like manner sent notice to the depot agent at West Newton for the Yough Slope mine also, and this last is true. The evidence tends to show that the Baltimore and Ohio Railroad Company did undertake and attempt in good faith, so far as we can see, to notify all these mines (the Yough Slope mine included) in the same manner, by telegraph, and at the same time, during the afternoon of the 30th of August, that the embargo that had prevailed upon shipments of coal to Cleveland was then at an end and that they could forward their coal and that this notice was then sent to the depot agent at West Newton for the Yough Slope mine. Whether the Youghiogheny and Ashtabula mines received their notice of their depot agent before or after inquiring of him is not shown by the evidence. If the Yough Slope mine failed to receive that notice as the other mines did it would appear upon the evidence to have been its misfortune, largely mixed with its own fault. If the Yough Slope mine was then suffering for want of cars a daily inquiry made by any of its agents of the station agent of the Baltimore and Ohio railroad at West Newton, near by this mine, would have revealed the fact that this embargo had ended the very day it was raised and would have been as natural, as proper, as inexpensive, as free from inconvenience as it would have been business like, and as clearly a matter of duty they owed the owners of the mines, but nothing of this kind appears to have been done. While carefully guarding their rights in all matters to which it relates, the Act to regulate commerce does not proceed upon the theory that shippers are absolved from all duty in looking

after the delivery of their freight to railroads for carriage. It would require more credulity than discrimination to believe, upon the evidence before us, that the Yough Slope mine was suffering for want of cars during the period elapsing between the 30th of August and the 4th of September, 1887.

It is manifest from the evidence that neither the Pittsburgh and Western Railroad Company nor the respondent attempted to conceal from the Yough Slope mine the fact that the embargo was raised, but, on the contrary, Johnson, the superintendent of the Pittsburgh and Western, informed the petitioners, who were the agents of that mine, of the fact on the 30th of August, and on the same day it was telegraphed by Bachelor to all the station agents of the Pittsburgh Division of the Baltimore and Ohio Railroad Company along its line. Other facts in evidence tend to negative the idea of any unjust discrimination. On the 19th of August, Bachelor, the master of trains of the Pittsburgh Division of the Baltimore and Ohio Railroad Company, sent an urgent telegram to Johnson, the superintendent of the Pittsburgh and Western, to know if coal from the Yough Slope mine could go forward to Arthur & Boylan, at Cleveland, Ohio. Taking the period from the 15th of August to the 4th of September, 1887, when the greatest trouble for cars existed, and it shows that the Yough Slope mine received considerably more cars in proportion to its need for them than did the Youghiogheny and Ashtabula mines, and this, too, while the shipments of the latter were chiefly to Fairport, upon a line where there was no trouble about a sufficiency of cars, and the former was shipping in large part to Cleveland, Girard, Monroe Falls, and Cuyahoga Falls, over a line where there was great trouble about a sufficiency of cars. Not a single instance is shown by the evidence where the respondent or any of its officers or agents have ever manifested any unfriendly spirit toward the Yough Slope mine, in its business or otherwise. The general manager of the Yough Slope mine, who owns a one-fourth interest in that mine, while admitting as a witness on the stand that he had frequently been dissatisfied and had complained during last August be-

cause he did not get all the cars he needed at all times, yet stated that during the entire season his mine had been treated as well in the matter of cars as any of its neighbors, and utterly repudiated the idea that there had been any unjust or unfair discrimination by the respondent against the Yough Slope mine.

After a careful consideration of all the evidence adduced by the parties in this proceeding we are of the opinion and so find that it fails to show that the Baltimore and Ohio Railroad Company was guilty of unjust discrimination under the Act to Regulate Commerce in failing to furnish cars to the Yough Slope mine for shipment of coal to Arthur & Boylan, at Cleveland, Ohio, between the 30th of August and the 4th of September, in the year 1887.

The order of the Commission is that this petition be, and the same is hereby, dismissed.

IN THE MATTER OF THE TARIFFS OF THE COLUMBUS AND WESTERN RAILWAY.

Decided March 12, 1888.

Tariffs not conforming to fourth section criticised. Circumstances stated found not sufficient to warrant deviation from the law.

Carriers should bring their tariffs into conformity with the statute without suggestions from the Commission as to details.

The following letter was addressed by a member of the Commission to the Central Railway and Banking Company of Georgia, operating the Columbus and Western Railway from Columbus to Childersburg, Alabama:

“TO THE CENTRAL RAILROAD AND BANKING COMPANY OF GEORGIA,
SAVANNAH, GEORGIA.

“GENTLEMEN:

“The Commission is in receipt of your Tariff E-198, establishing class rates from Savannah, Georgia, to points on the line of the Columbus and Western, taking effect January 16, 1888, from which it appears that a greater sum is charged to a large number of points at a less distance from Savannah than Sylacauga, than is charged to Sylacauga over the same line in the same direction.

“The Commission will entertain the consideration of any statement or argument which you may see fit to make and file within twenty days from this date, upon the question whether said tariff is not in contravention of the provisions of the Act to Regulate Commerce.”

To said letter the following reply was received: .

“FEBRUARY 13, 1888.

“INTERSTATE COMMERCE COMMISSION,

“*Washington, D. C.*

“GENTLEMEN:

“I acknowledge herewith receipt of your letter of February 1, on the subject of rates from Savannah to Sylacauga.

“I beg leave to say that the rates from Savannah to all stations this side of Sylacauga are practically the rates established by the State Commissioners of Georgia and Ala-

bama until we come to Sylacauga itself. There we found in effect upon the Anniston and Atlantic railroad rates which were very much lower. As we could not control their rates at this point, we were compelled to conform our rates to them or else to abandon the business. The business at that point is light, and we would greatly prefer to abandon it to scaling the rates this side. As the rate which prevails on the Anniston and Atlantic is based, I understand, upon the rates at Selma, upon the Alabama River, added to the East Tennessee local to Sylacauga, I considered the competition at Sylacauga as under dissimilar circumstances from the competition at points east thereof.

“As to the actual amount of the rate and the comparative differences between Sylacauga and adjacent stations, I beg leave to say that even with those rates the Columbus and Western railroad has never yet paid the interest upon its bonds, and is practically supported by the Georgia Central railroad. Its local rates have been approved by the State Commission of Alabama on the ground of its poverty and low earnings. Anticipating, however, an early improvement by the approaching completion of the line to Birmingham, a new set of rates has been in process of preparation and was forwarded to the Alabama Commission for approval on January 28. These new rates make a very material reduction, and will be put in effect as soon thereafter as it is possible to print them and distribute them. They will very largely modify the differences which prevail under Tariff E-198. I beg leave to hand you herewith a copy of these rates, with comparison on the same sheets with the rates now in force. I will be under many obligations to have the judgment of the Commission upon them, or the suggestion of any other basis upon which they could be made than the one adopted.

“Very respectfully,

“E. P. ALEXANDER,

“*President.*”

MEMORANDUM BY THE COMMISSION.

In view of the decisions heretofore made by the Commission upon the subject of the interpretation of the fourth sec-

tion of the Act to Regulate Commerce, it is not apparent how the facts and considerations which are stated in the foregoing letter can be regarded as sufficient to warrant the deviations from the rule of said section which are found in the tariffs from Savannah to points on the Columbus and Western railroad, as now on file or as proposed.

The concluding request for "the suggestion of any other basis upon which they could be made" is also noted. The Commission has not as yet considered it necessary or expedient to make such suggestions; it has uniformly held that the carriers themselves should devise the methods by which their tariffs should be framed in conformity to the law. Other carriers have found it possible to enter upon a reconstruction of their modes of rate making, involving a substantial abandonment of many of the discriminations which seem to the public to be unjust, the existence of which was, in part at least, the occasion of the passage of the Act to Regulate Commerce; this has in some instances been accomplished by the grouping of stations for the making of through rates.

The views of the Commission, so far as it has yet found occasion to formulate them, are expressed in the opinions heretofore rendered, particularly those in the matter of *The Louisville and Nashville Railroad Company*, and in the case of *Harwell and others v. Columbus and Western Railroad Company*. (1 I. C. C. R. 31; Ib. 236.)

NOTE.—A new tariff was immediately filed with the Commission, making interstate rates to and from the road above-named, which do not charge a higher rate for a shorter distance than for a longer, over the same line.

**THE LA CROSSE MANUFACTURERS' AND JOBBERS'
UNION v. THE CHICAGO, MILWAUKEE AND
ST. PAUL RAILWAY COMPANY, THE CHICAGO
AND NORTHWESTERN RAILWAY COMPANY, AND
THE CHICAGO, BURLINGTON AND NORTHERN
RAILROAD COMPANY.**

Decided March 10, 1888.

The fact that the rates of a railroad company are not established on a mileage basis does not necessarily make out their illegality or injustice.

A prayer in a petition against a railroad company, that the company be required to make its rates from one terminus to the town from which the petition proceeds and to other towns in the same section, and also from such terminus to the petitioning town and from thence to such other towns, on a uniform and equal mileage basis, cannot be granted, the Commission having no power to require the adoption of such a basis.

A complaint will not be filed of which no reasonable ground for investigation appears.

BY THE COMMISSION.

In the petition offered for filing in this case complaint is made of the rates charged by the defendant companies for the transportation of merchandise from Chicago, Ill., to La Crosse, Wis., from Chicago to towns in the vicinity of La Crosse, and other towns further to the west and northwest whose merchants and dealers have been accustomed to make their purchases in La Crosse, and from La Crosse to such other towns respectively. The complaint, briefly stated, is that the defendant companies make the same charge for the transportation of merchandise from Chicago to La Crosse that they do for the transportation of like merchandise from Chicago to other towns which are at a greater distance, and that they charge relatively much more from La Crosse to the towns which would naturally do business with it than they do from Chicago to the same towns. The results are alleged to be injurious to La Crosse, and especially to its jobbing trade, since it enables the towns which would naturally purchase their stocks and supplies at La Crosse to procure them from Chicago direct at much less cost for transportation than

must be paid when the same goods are sent first to the jobber in La Crosse and from thence to the dealer in such other towns, which would be the course of business if transportation rates were favorable.

The prayer of the petition is that the Commission "will make such order as will restrain the several respondent companies from such practice, and will compel them to carry freight from Chicago to La Crosse at the same rate per ton per mile as they do or may hereafter charge for carrying the same class of freight from Chicago to points beyond La Crosse; and also that the said railroad companies be ordered to charge the same rate per ton per mile on each class of merchandise carried from La Crosse as they do or may hereafter charge on the same classes from Chicago to points beyond La Crosse, with the addition of such charges for terminal expenses and re-handling as the Commission may find just and reasonable; and petitioner has reason to believe that an average addition of not more than five cents per hundred pounds for the first and second classes of freight, and two and one-half cents per hundred pounds for the third, fourth and fifth classes, would be more than sufficient to cover such terminal charges and the cost of re-handling at La Crosse."

Before filing the petition and calling upon defendants for an answer, it may be desirable to consider whether the Commission has the power to give to the petitioner and those it represents the relief which is sought. This question must be determined in the light of the prayer which is above recited. The prayer defines what is desired, and what it is supposed will remedy the mischief of which petitioner complains; and if any different or other relief would be possible on the facts, a discussion thereof would be irrelevant now. We have only to consider in this case whether it is possible and proper for us to grant the particular relief prayed.

Referring to the petition it will be observed that what is prayed for is the establishment of the mileage basis for rates for the transportation of merchandise in the territory northwest of Chicago in which the jobbers of La Crosse find the market for their goods. La Crosse desires the same dis-

tance rates for the transportation of goods from Chicago which are given to any other town in that section of the country, and the same distance rates on consignments to other towns which are made on consignments from Chicago.

The rates to La Crosse from Chicago are not complained of as being in themselves excessive, but the defendant companies, it appears, in making rates into that territory, group the towns of a considerable district and charge the same rates to all within the district. This is a practice which prevails very largely in the making of rates, and results in giving to some towns rates which are relatively lower than are charged to others. It is probably a convenient practice to the railroad companies or it would not be so often adopted; and it may sometimes tend to equalize railroad advantages as between towns without wronging any one. The system itself is, therefore, not necessarily illegal; it only becomes illegal when it can be shown that illegal results flow from it.

What the Commission is required to determine, then, is whether one town is entitled to demand equal mileage rates with other towns, and especially whether the merchants and traders of La Crosse in their jobbing trade of goods, of which the chief centre of supply is Chicago, are entitled to the same rates, first from Chicago to La Crosse and then from La Crosse to the ultimate point of sale, which are given when the merchandise is sent from Chicago direct to the same ultimate market. And the question is not whether the carriers might voluntarily give the same rates, but whether they are required by law to give them.

The question is not new to the commission; it has been raised several times, and has once been formally passed upon. In considering such a question it is proper to observe that the ruling asked for cannot be made for any one town or place except upon principles which will be generally applicable. No city or locality can be recognized as having in law natural or other claims to special rules which cannot be claimed by others. Natural and other special advantages and disadvantages must no doubt be had in mind and considered by those who make rates, and must some times to some extent govern in making them; but the spirit and purpose of

the act from which the Commission derives its powers require equal and impartial rules, and do not recognize any authority in the Commission to give any locality special advantages. If, therefore, La Crosse can demand the mileage basis for the making of rates to and from that city, so can Red Wing, Albert Lea, and all the smaller towns in the territory whose people are accustomed to trade at La Crosse; and the final result of the recognition of the right must be the establishment of the mileage basis, not merely for the country in which the merchants and traders of La Crosse find their markets, but for the whole country.

It is a matter of general history that when the Act to Regulate Commerce was pending in Congress the mileage basis was suggested but was not adopted. The reasons against it were, no doubt, thought to be conclusive. Many circumstances fairly entitle and sometimes compel the carrier to make rates on one line proportionately less than are made on another. The volume of business, the strength of competing forces, the direction of traffic, the convenience of exchanges, the relations of carriers to each other, and a multitude of other circumstances have, or may have, an important bearing. All of these the carriers, in making their rates, ought to have in mind and consider with care, with a view to the establishment of such charges as shall be relatively equal and just, or as nearly so as may be found practicable; but the mere fact that in the making of rates the mileage basis has been disregarded cannot be deemed proof of unlawful action when it is considered that the law making authority, for reasons which must be deemed conclusive, has refrained from adopting that basis.

It is possible that if the tariffs of the defendants had been framed by the Commission, points so far apart as La Crosse and Mankato would not have been grouped under identical rates, and that in some other particulars the rates might have been different. But on this petition we deal only with the question which we conceive it to present. That question was fully and deliberately considered in the case of *Crews v. The Richmond and Danville Railroad Company*, 1 Int. Com. Com. Rep., 40, in which case like privileges were demanded on

behalf of the merchants and traders of Danville to those here claimed for the people of La Crosse, and the Commission was unanimously of opinion that it had no power to require what was sought. There were, as between that case and this, some differences in the facts and the prayers for relief, but the principle there involved was the same that must here be invoked. The question having, therefore, been deliberately considered and passed upon, it would be idle to send out this complaint as the beginning of a new litigation, the result of which must necessarily be the same as in a case already decided. The petitioner will therefore be notified accordingly.

IN THE MATTER OF UNDERBILLING.

Investigation conducted by the Commission at New York City, Buffalo, Detroit, Chicago, Omaha, Lincoln, and Washington, in March, 1888. Opinion filed April 11, 1888.

Underbilling, a device by which a shipper pays for the transportation of a less quantity of freight than is actually carried, and thereby obtains a reduced rate upon the gross shipment, is forbidden by the Act to Regulate Commerce.

Unjust discrimination results from underbilling, in that the favored shipper pays a less sum than is charged others for the same service.

Common Carriers are bound to exact equality in their service of the public. Organized action by carriers to prevent underbilling commended; their duty to put an end to the practice insisted upon.

Carriers should be held, and in turn should hold every agent, responsible for the shipment of goods at exact weights and correctly classified.

Commissions paid to soliciting agents when divided with shippers effect a breach of the law.

Shippers should be required to extend to carriers the same honesty expected in other commercial transactions.

Preferences obtained by underbilling explained, and remedies suggested.

Legislation recommended imposing a moderate penalty upon shippers who wilfully and fraudulently obtain reduced rates of transportation for their property.

OPINION AND RECOMMENDATIONS OF THE COMMISSION.

WALKER, *Commissioner*:

The Act to regulate commerce forbids "unjust discrimination" by common carriers subject to its provisions. It de-

finer unjust discrimination, declaring that a common carrier is guilty thereof whenever it "directly or indirectly, by any special rate, rebate, drawback or other device," charges one person more than another for the transportation of a like kind of traffic under substantially similar circumstances and conditions. The act forbids the giving of any undue or unreasonable preference or advantage to one person over another by any common carrier subject to its provisions, and the subjecting of "any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatever." It also makes it unlawful for any such common carrier to charge or receive a greater or less compensation than the rate which is specified in its published schedules in force at the time.

The enumeration in section 2 of special rates, rebates, drawbacks and other devices, shows the methods of favoritism which were presented most distinctly to Congress in framing the law in question. The investigations which preceded the passage of the act had disclosed the fact that preferences were very frequent, in fact were almost universal, and that "the effect of the prevailing policy of railroad management is, by an elaborate system of secret special rates, rebates, drawbacks and concessions, to foster monopoly, to enrich favored shippers, and to prevent free competition in many lines of trade in which the item of transportation is an important factor." (Cullom Report, 181.) The act was prepared accordingly with those evils more directly in view.

In reviewing the operation of the law for the first eight months in which it was in force the Commission felt justified in saying in its annual report that the law had operated directly to increase railroad earnings by putting an end to rebates, drawbacks and special rates upon freight business—a result which was also found to be eminently satisfactory to the general public; and the investigations of the Commission have not as yet disclosed the existence of unjust discrimination resulting from the use of those particular methods of preference in interstate traffic. On the contrary, a vast number of instances have been found where special

rates, rebates and drawbacks have been discontinued, and where preferences and advantages which were formerly thereby given have been terminated.

It perhaps was not to be expected, however, that the giving and obtaining of special favors in transportation would be abandoned immediately upon the enactment of the law, either by shippers who had been accustomed to enjoy them in business strife, or by carriers who had been wont to employ them for the purpose of obtaining traffic in the face of competition. The education of the public, under the business practices which had been not only countenanced but encouraged by the carriers for a long series of years previous to the passage of the law, had been such as to largely obliterate the idea of honor as entering into the case in any degree whatever, and to suggest that the new law was not passed to be obeyed, but to be evaded. The time may come when it will be thought to be as disgraceful to obtain transportation dishonestly as to acquire property dishonestly; and when citizens who control the agencies of public carriage will consider the permission of unequal advantages in transportation in the same light in which they now ought to regard a fraud upon the ballot-box. It is not obvious in what way the obtaining of free transportation or reduced rates of transportation by trick or device is less dishonorable than any other form of cheating; nor is it apparent how the procuring of business by the carriers, through practices whereby one shipper is given a pecuniary advantage over another in a public service, differs ethically from the payment of a bribe.

Nevertheless, neither shippers nor carriers have been accustomed to stop and consider these questions. If presented they have been brushed aside, in the race for business which absorbs the entire community. A common carrier should be as sensitive to suspicion of unfairness as a register of deeds, clerk of a court, or any other public servant. The purchase of his services at a stated price, equal to all, should be a matter of course with every shipper, without any more thought of obtaining personal advantage in the transaction than of counterfeiting the coin that pays the bill.

The re-establishment of a correct public sentiment upon this most important matter must be effected by the enactment and enforcement of just laws. In the Act to regulate commerce the country is brought face to face with certain principles governing transportation by common carriers which had been almost totally overlooked. One is that their service is a public service, and that common carriers have no right to conduct their business as private enterprises are sometimes conducted, giving favors for the hope of gain and seeking to control business by discounts and concessions. Such methods, possibly legitimate in the counting-room of the merchant or the manufacturer, must be rigidly excluded from the office of the common carrier. The very name "common" carrier implies equality; it signifies common to all; the servant of the public. The adoption of the vocation carries with it the assurance imposed by one of the elementary principles of the common law, that every customer shall be served alike; and it is rewarded with privileges and securities which many other vocations do not possess.

On the other hand the common carrier is at least entitled to the same fair dealing and honesty on the part of its customers which are expected between man and man in the ordinary commercial transactions of life, and should not be called upon for the exercise of an extraordinary degree of suspicion or required personally to revise every representation made by shippers. The business of the world is founded upon mutual trust and confidence. When once the true relations of the common carrier to the public are generally recognized, and their importance appreciated, the same honorable course of dealing which American merchants and manufacturers are justly expected to pursue between themselves and with strangers will be applied unhesitatingly in respect to the subject of transportation.

The prohibitions of the Act to regulate commerce are fortunately not limited to the methods of unjust discrimination by special rate, rebate or drawback, but contain the added words "or other device." The attention of the Commission has been recently attracted in various ways by allegations that the device known as "underbilling" is being largely em-

ployed by shippers and carriers as a method by which a less compensation is paid by one person than by another for "a like and contemporaneous service." It became the duty of the Commission to investigate the subject, and such an investigation has accordingly been had. Time was not available for such a full examination of the question in all parts of the country as might have been desired, but the taking of testimony and the collection of facts was carried sufficiently far to lay open the subject as it is found to exist in certain important localities, from which generalizations can be safely made. A statement of the matters thus disclosed, in respect to a part only of the traffic concerning which detailed evidence is in the hands of the Commission, is given below, with some explanation of the difficulties that surround the situation and some suggestions for the correction of the evils that exist.

There is no doubt whatever, and the Commission finds the fact to be, that an immense amount of traffic has been carried by the railroads of the country during the last six months, and to some extent during the entire period since the passage of the Act to regulate commerce, the tonnage or weight of which was underbilled. The shipper in such cases pays freight upon a less quantity than is actually carried, the result of which is that upon the gross amount he pays a reduced rate; in other words, a less sum, than is charged to other shippers for a like service.

This has not been confined to any particular road or group of roads, but has been very generally prevalent in various parts of the United States, and even upon lines which at the same time were protesting most emphatically their absolute conformity to the requirements of the law. The practice is unequivocally condemned by every railroad official and traffic manager whom the Commission has approached upon the subject; and they have been very many, including officers of most of the leading lines in the Central and Western States; but at the same time the fact cannot be denied that the same lines have admitted traffic upon which the billing was short, and that usually they have known, or easily might have known, that such was the case.

It should, however, be added that measures have been voluntarily adopted by many of the carriers, designed to prevent future underbilling; inspection of freight has been greatly extended; methods of receiving freight in some cases have been changed, and although the practice is by no means at an end, considerable progress has already been made in the direction of putting it down.

A difficulty in dealing with this device under the existing provisions of law is found in the fact that in each particular case the carriers assert that they did not know of its existence; that they were imposed upon by the shipper or were unwittingly led into error by the fraud or ignorance of an agent; so that while these irregular shipments may have been overlooked or winked at, and in many cases perhaps suggested, by the responsible officers of the companies, yet proof of this, to the satisfaction of a jury in any given case, might be difficult to make. Nevertheless in every case a degree of negligence is apparent which is not easily explainable. Various excuses also are offered; the appliances and assistants necessary for ascertaining weights and quantities are deficient in many places; the exaction of just tonnage by one road might send business to a less scrupulous competitor; the traffic is received from connections where means or disposition to be exact may not exist. The general fact is apparent that railroad managers are reluctant to move individually in putting an end to discriminations of this kind; that voluntary action in the direction of precision cannot be expected from the carriers unless it is joint action on the part of all the carriers concerned in the competition for the traffic involved; that however much the managers of the roads may protest their desire to deal equally and justly by their patrons and however obvious may be the fact that such equality of conduct would involve no loss to themselves, but a probable material gain, yet fear of losing a little business to a rival line has induced much neglect of the paramount considerations of propriety, justice and law; so that traffic managers have shut their eyes to the wrong involved until such time as concerted action might be had.

The existence of wrong tends, however, to the adoption eventually of some form of remedial action. The regulation of matters of this character in respect to competitive business has been taken up by associations of roads, in which joint action is available and where a committee can be authorized to represent the whole. For example, in the Trunk Line Association the development of the facts concerning the great increase of underbilling during the last winter led to recent authoritative action for the more efficient organization of a bureau of inspection. This system has been in vogue for some years, to a gradually increasing extent. A corps of inspectors is employed whose duty it is to examine freight passing certain specified points, to weigh the car-load lots, and to investigate the correctness of the classification under which the merchandise is billed. In this way a revision is had of the billing of the various roads which compose the association, and a check is held over underbilling by agents as well as misrepresentations by shippers. So long as these inspectors are honest and efficient their work is useful, not only to the carriers but to the public. In case short weights are found the correction of the bills of lading is insisted upon, and the freight money required for the transportation of the true weight must be made up by the consignor or consignee before the merchandise is delivered. In case the classifications are found wrong a like correction is made. The instructions given to the inspectors require them to correct in favor of shippers as well as against them, in case errors of that kind are found. The workings of this system have been examined by the Commission and suggestions made have been cheerfully adopted. Its extension is likely to be of much use in putting an end to the vicious practice of underbilling, although the Commission is unwilling to accept it to any extent as a substitute for the requirement that every carrier should itself be held, and in turn should itself hold every station agent, responsible for the correctness of the weight and classification of the freight received, so far as the same can be practically ascertained.

Inspectors are now at work at Toronto, Suspension Bridge, Buffalo, Salamanca, Pittsburgh, Parkersburg, and other

places on the same general meridian across the route of the trunk lines, so-called, who will soon be able to report upon every shipment, east-bound or west-bound, through the points referred to. A similar service has also been established at various points in the Western States and in the territory of the Southern Railway and Steamship Association.

The extent to which underbilling has been resorted to for the purpose of evading the requirements of the Act to regulate commerce will be partially seen from the facts now to be stated.

Sixty-one cars from the Michigan Central Railroad were weighed at Black Rock February 1 to 18, 1888; of these the billing of 57 cars was short, in all, 273,350 pounds, and 4 cars were overbilled, in all, 4,100 pounds. Of the cars underbilled the errors upon 20 exceeded 5,000 pounds each, and on 4 exceeded 20,000 pounds each; while on 18 the errors were less than 1,000 pounds each, in which case they are disregarded by the inspectors; a margin being necessary for variations of scales, differences in weight of cars when dry, when saturated with moisture, when loaded with snow, or when not thoroughly cleaned, as well as for other reasonable corrections and possible minor errors.

One hundred and thirty-five cars from the same road were weighed at Suspension Bridge January 23 to February 15, 1888. Of these the billing of 129 cars was short, in all, 536,545 pounds, and of 6 cars was over, in all, 7,290 pounds; the shortage on 42 cars exceeded 5,000 pounds per car, and on 11 cars exceeded 10,000 pounds per car.

Forty cars from the New York Central and Hudson River Railroad, west-bound, were weighed at Suspension Bridge February 6 to 13, 1888, and were found short, in all, 109,280 pounds, or 8 per cent. of the total weight as way-billed. For example, a car-load of iron billed at 32,000 pounds from Albany to Detroit was found to weigh 42,400 pounds; a car-load of salt from Rochester to Chicago, billed at 24,000 pounds, was found to weigh 32,350 pounds. Other underbilling was in car-loads of potatoes, cider, apples, glass, etc. It should be noted that upon the Buffalo inspection line the

east-bound movement has been considered most important, and comparatively little has yet been done in respect to the west-bound freight.

Of the east-bound cars above mentioned a few examples of the most flagrant underbilling are given, by way of illustration, as follows:

From—	To—	Contents.	Billed weight.	Actual weight.
Toledo.....	Oswego.....	Corn.....	26,000	36,100
"	"	"	26,000	35,850
"	"	"	25,000	34,400
"	"	"	26,000	37,700
"	"	"	27,000	41,800
East Saginaw.....	New York.....	Oats.....	24,780	28,500
Joliet.....	"	"	24,000	27,300
Indianapolis.....	Philadelphia.....	Lumber	35,000	43,060
"	Bridgeport.....	"	30,000	43,600
New Albany.....	Troy.....	"	24,000	31,700
Chicago.....	W. River Junction...	Screenings.....	24,000	37,000
Hammond.....	Lonsdale.....	Tallow.....	27,000	29,550
"	Elizabethport	Fertilizers	30,000	36,150
Danville.....	New York	Oats.....	30,000	40,800
Comber.....	Skaneateles.....	Staves.....	24,000	30,600

In examining the schedules in detail a large number of grain shipments from Toledo were observed, of which only a few are given above. In all some fifty car-loads of grain were shipped from Toledo to various points, of which the average underbilling was over 12,000 pounds per car, considerably more than 25 per cent. of the actual weight being thrown off. At first it seemed incredible that such a series of transactions could have occurred without the connivance of the responsible officers of the railroad company. Investigation showed that it is not impossible that the carrier was wholly innocent, as it stoutly claims to be. The shipments, or many of them, were made by Messrs. Southworth, Paddock & Company, of Toledo, from an elevator known as the Narrow-Gauge Elevator, situated at the junction of the Toledo, St. Louis and Kansas City Railroad with the Canada Southern. The business of this firm was solicited by the agent of the Michigan Central (operating the Canada Southern). The margin under which grain could be profitably handled by the Toledo operators was very close. Shipments

were presently begun in which the cars were loaded from the elevator, and closed; the weights furnished by the shipper were accepted by the carrier as correct for billing purposes. The elevator in question was not a "public" or "regular" elevator, in the strict sense, signifying responsible supervision and exactitude officially ascertained, but it has long been customary for carriers to accept its weight, which had been previously believed to be accurate. When the underbilling was discovered by the inspectors at Buffalo a demand was made upon the shippers, who paid the amount required as freight upon the total weights reported. The agent of the railroad company asservates that he made no suggestion that the grain might be underbilled, and had no suspicion that such was the case. The shippers, however, seem in some way to have obtained an impression that the weights given by them would be accepted without correction.

The above facts have been stated as an example of the way in which such business can be done on a large scale with a possibility of ignorance on the part of the carrier. It should be further stated that after the disclosure of the facts was made, the Michigan Central commenced at once to weigh all car-load lots originating at Toledo upon its own track scales; and also that indications point strongly to the fact that the parties above named were not the only Toledo shippers who have habitually underbilled grain, nor was the above-named line the only carrier which accepted such underbilling.

It is apparent that the party which directly reaps the benefit of a fraud like that above described is the shipper. The grain is sold at a certain price "laid down." The purchaser pays for the total grain shipped, as per invoice, deducting the freight actually paid, as per way-bill. The carrier is not benefited by the transaction, except perhaps indirectly in receiving a consignment of freight which might have sought some other route or which the party in question might have been unable to profitably handle at all at the tariff rates applied to honest billing.

West-bound freight from eastern cities is received by the carriers under circumstances which afford opportunity for

fraud in a manner to some extent apparently unavoidable. At New York city the various trunk lines have receiving stations upon the wharves in the lower part of the city and in the city itself. Merchandise is delivered at these stations in an almost constant stream throughout the day. The space available is necessarily somewhat contracted and the accumulation of freight must be prevented. The employees of the carriers receive the contents of each dray delivered to them in packages securely boxed and hooped, and at once truck the boxes and bales to the weighing apparatus, from which it is immediately distributed, according to destination, among the cars in waiting on the tracks or floats. No complaint has appeared in respect to the weights of this class of merchandise, but the classification is made according to the contents as marked upon the packages or the information furnished by the shipper or the drayman. In the rush of business thorough examination of the packages to ascertain contents is almost impossible; nevertheless, a misstatement thereof may cause a reduced classification of the goods, by which the shipper or consignee will be materially benefited and the carrier defrauded to the same extent, while other dealers who represent contents truthfully are correspondingly prejudiced by the unjust discrimination. A person who sells an article to another person representing it to be what it is not is liable to punishment for the fraud; a willful misrepresentation to a carrier for the purposes of reduced freight charges is not different in principle.

The method of receiving miscellaneous freight as above described is substantially followed at other large cities and distributing points. The cars so loaded follow the various lines of road to their several destinations. It is impossible for the carriers to inspect their contents *en route*, without stopping them, unloading them entirely, and opening each package, a single carload often containing goods from a large number of shippers.

Shipments in car-load lots originating in the east are occasionally received from a shipper at a public station, but more frequently are loaded by the shippers themselves upon

side tracks placed for their convenience at the various factories, mills, iron works, refineries and other manufacturing establishments found not only in the large cities in the east but throughout the Eastern States, and the Central, Western and Southern States as well. In respect to such shipments the character of the goods offered is generally known, although there are opportunities for fraud in representing the contents of car-loads. The weights also may be verified by the carriers, who have track scales at different points for the purpose. It has been quite generally customary, however, for shippers of car-load lots to furnish the billing agents with a slip containing the description and weight of the contents of each car, from which the way-bills are made out without question, the cars going through to destination without being opened for inspection and without any verification of the weights. It is obvious that this course of business affords great opportunity for obtaining preference and advantage, although the same standard of commercial honesty that is observed in other transactions would not permit any misrepresentation to a carrier. Unfortunately this standard is not considered as applicable to the conditions of traffic. There is no law which forbids deception and fraud practiced upon common carriers by shippers in interstate commerce, and while at way stations and elsewhere the goods of the man who ships in small lots are carefully scrutinized and exactly weighed, heavy shippers who ship in car-load quantities and who have the most to gain by underbilling are permitted to turn in their weights and pay their freight accordingly.

Many of them no doubt justify themselves in making estimates for railroad purposes which are much below the actual tonnage, upon the theory that others are allowed to do so or could do so without detection, and that business competition cannot be met without the pursuit of like practices; and others again who decline to become parties to such transactions themselves are willing to overlook them on the part of associates or subordinates, or are compelled to withdraw from the competition altogether. Certain practical illustrations taken from the evidence will be found below.

There is no doubt but that the carriers might themselves

in great measure put an end to this evil of underbilling of weights in car-load shipments, and that they ought to be held largely responsible for its existence. Until quite recently it has been a general custom to estimate car-load weights, upon many kinds of freight at a fixed amount without reference to the actual contents of the car. Unwillingness is felt to incur the opposition of important customers by adopting new methods which involve more rigid supervision. A complaint of unjust suspicion is at once raised, attended by a suggestion that the business will be taken elsewhere, which is usually sufficient to prevent any change; and although the traffic manager may know to a reasonable certainty that his line is being defrauded, nevertheless he omits to make the actual tests which would definitely disclose the fact, in order to be able to say within a certain margin of truth that he is ignorant of it. The larger the transactions the greater the temptation to the shipper, and the greater the fear of loss of traffic on the part of the carrier; so that in this case also action by individual carriers is unwillingly and inefficiently attempted, if at all; joint action is at times resorted to when the underbilling becomes too flagrant to be overlooked.

In cases where the circumstances of the shipment are such that the contents of the car are not seen by the railroad employees, and the weights are given by the shipper, the carrier should always be furnished with the actual invoice of the shipment, and should have an opportunity to inspect the original books of the shipper for the purpose of verification; but even this should not be regarded as a substitute for the actual knowledge by the carrier's agent of the contents and weight of every car. Each carrier should hold each billing agent responsible for the accuracy of his way-bills. If facilities and assistants are not at hand they should be provided. Carriers should have sufficient moral courage to attack this subject thoroughly and individually, without waiting for the action of competing lines. If this work can be done at the wayside and in the case of small shippers it can be done in cities and upon shipments of magnitude. It seems to be simply a question of expense, and the observation of the Commission in respect to the billing of large shipments from

important points shows clearly that the expense of thorough inspection at each initial station before accepting the freight for transportation would be made up many fold in added revenue to the carriers.

It would not be an unreasonable rule of evidence which would hold the carrier responsible for ignorance in almost every case of underbilling by weight. If the carrier does not know the actual weight, the cases are rare in which it may not be easily ascertained ; and failure to know what is easily ascertainable is often in law the equivalent of actual knowledge.

Another cause of underbilling is found in the active competition for traffic, under the stress of which a vast number of soliciting agents are employed, whose offices are found not only on the corners of the most expensive streets of every city, but in the rural communities as well ; and who represent, both in their fixed establishments and in their movement up and down the land, not only the carriers directly, but also various so-called "lines"—red, white, or blue, as the case may be ; whose only interest is to obtain traffic ; who have little responsibility of their own or to their ultimate employers ; and whose object in life is necessarily to make a record of success in securing business which shall warrant the continuance of their employment and of their pay. All this gilded advertisement and persistent solicitation in the end is paid for by the public. The business exists and the public service of transportation must be done, whether or not any agent intervenes to help along the contract. Whatever arrangements and considerations are devised for the purpose of securing a shipment to a given line are necessarily at the expense and to the prejudice of some other shipper. In maintaining these methods of operation the carriers afford opportunity for the creation of favored individuals, localities and description of traffic in contravention of the letter and the spirit of the law. Without the most rigid supervision the system cannot fail to be dangerous.

Moreover, when soliciting agents are compensated by the

payment of commissions, the danger is largely increased. The division of a commission between the soliciting agent of a railroad or of a line and his customer, obviously operates to give the shipper a lower rate of freight than the published schedule; and as the matter is within the control of the agent's employer the carrier which permits it is responsible for the violation of law involved.

And, on the other hand, the local agents employed by the carriers to receive and forward merchandise from stations are naturally, in many cases, men who are not upon the highest plane of honorable conduct. It appears that temptations of such agents by shippers are not unknown nor always unsuccessful. A trifling gratuity to a station agent may easily be so expended as to save many times the amount to his customer. The possibilities for fraud which may be contrived between unscrupulous shippers and weak or unreliable employees are enormous.

One of the chief difficulties encountered in dealing with a subject like that of underbilling springs from the fact that the carrier must necessarily entrust its business to a great number of agents, and that, being itself a corporation, there often is not on the part of these agents the personal fidelity and loyalty which are likely to exist between employer and employee when the employer is a natural person. In very many cases it is not unlikely that, as between a carrier and one of its patrons, the inclination of the agent would be to prefer the interest of the latter and to sacrifice the interest of his employer to it. If his disloyal conduct affected injuriously third parties, as it commonly would, under the law as it now stands there would be no remedy except the criminal remedy, and none at all unless criminal intent on the part of the agent could be established; but the wrong in such a case is more likely to be accomplished through the failure of the agent to exercise due vigilance than through any overt act of dishonesty on his part; and when it is borne in mind that at times a general feeling of discontent may prevail among the employees of a carrier it is not difficult to understand that there may be serious and numerous wrongs, amounting in

result to violations of law, of which the managing officers may be wholly ignorant, and which are accomplished not through dishonest connivance, but only because employees do not exercise the care which is necessary to prevent them.

The effect upon the legitimate business of other shippers which is produced by opportunities for underbilling taken advantage of by competitors can be briefly illustrated by facts disclosed in the course of the investigation at Chicago. The public elevator system there is recognized as accurate, and weights furnished therefrom are universally accepted without challenge; small discrepancies of fifteen, twenty or thirty bushels to the car were the utmost irregularities spoken of. In Chicago and its suburbs a large number of so-called private elevators are also found from which the returns of weights have been heretofore accepted in like manner by the carriers as *bona fide* and correct.

The price paid for grain by a purchaser is frequently of itself sufficient evidence of the existence of some concession or advantage in the rates of freight. A dealer who observes his competitor purchasing cereals at prices which he cannot afford to pay, in view of the market at the point of delivery and the expense of transportation, immediately infers that the rates are being manipulated, and the inference is strengthened if the fact is observed that such shipments usually follow some particular line. An effort immediately follows on the part of other dealers to participate in like advantages, and no stone is left unturned to accomplish this result.

Upon the breaking down of a car loaded from a private warehouse and shipped on the Grand Trunk line it was discovered that the car was carrying 15,000 pounds of grain in excess of the weight which had been furnished for billing. A general system of weighing cars from private elevators was entered upon by that company. A few instances of the results are given as follows:

Car number.	Billing weight.	Actual weight.
2767, N. D.....	30,000	38,200
3033, M. C.....	34,000	43,150
2777, G. T.....	28,000	36,250
9791, N. D.....	28,000	36,200
9700, C. Ex.....	28,000	36,250
9720, C. Ex.....	28,000	36,350
10659, G. T.....	30,000	36,050
2140, N. D.....	26,000	33,200
3743, N. D.....	34,000	40,250

The Chicago and Grand Trunk Railway Company has recently organized a new system for the transfer of grain to its cars at Chicago and vicinity, embracing an accurate weighing of the grain, for which the board of trade has formally expressed its thanks to the company on behalf of the grain interests of that city.

The cars weighed as above stated were consigned to Lynn, Charlestown, South Framingham, Lawrence, Lowell, Methuen and other local points in Massachusetts, Rhode Island, New Hampshire and Connecticut. Car-load consignments of grain to interior points in the Eastern States are not subject to any examination or correction as to weight at the point of delivery. Grain shipments to New York, Boston and other seaports are usually delivered at elevators, where the contents of the cars are separately weighed; but facilities for weighing are not found and could not reasonably be provided at the smaller cities and towns where a vast amount of this grain naturally goes. The shipments as originally billed are delivered without examination or correction. The grain is usually sold at a named price, delivered, and drafts are drawn for the actual amount, deducting the freight upon the tonnage as way-billed. In this way the shipper gets the benefit of the underbilling, which may amount to fifty or sixty dollars per car.

Another course of dealing in which underbilling has been largely resorted to, is shown in the following illustration: The contents of car No. 10704 (containing middlings) from the Wisconsin Division of the Chicago and Northwestern

railroad were sold on the floor of the Chicago Board of Trade in February last. This car had been billed as containing 21,600 pounds, freight prepaid. When the middlings were transferred for shipment east to a Nickel Plate car and re-weighed it was found that the car contained 45,500 pounds. This car was weighed a second time with the same result. It had been underbilled 23,900 pounds. In that transaction the miller saved $7\frac{1}{2}$ cents per cwt. freight on 23,900 pounds to Chicago. If the middlings had been loaded into a "line" car and gone through without transfer he would have saved \$84 freight on the car-load.

The evidence shows that during the past season a large amount of grain has been loaded at interior points in the Western States and gone through various junction points south and west of Chicago, without transfer, to the East. The shipments are made from small country stations, where no facilities for weighing the grain exist, but where local buyers have store-houses or country elevators, and their weights have been accepted by the carriers in reliance upon their good faith. It is a custom among railroads to seal cars for long-distance shipments, keeping a record at junction points of the condition of the seals; a road upon which a seal is unbroken not being regarded as liable on damage claims, unless the seal remains intact throughout the trip, in which case the loss is apportioned. In many cases of underbilling the initial railroad company has no doubt been cognizant of the fact that the weights were not full; soliciting agents of the through lines have very likely been in part responsible; while other cases no doubt exist in which the carrier was entirely innocent of all complicity in the transaction. In many instances, however, carelessness at least on the part of the local agent must have existed; and negligence on the part of the carriers in failing to weigh at the first track scale may also be claimed.

The result of all this has been exceedingly disastrous to dealers endeavoring to do a like business in a legitimate way. Not only the Chicago Board of Trade, but similar organizations in several other cities, have asked for the passage of a law which should make the fraudulent shipper criminally responsible for his conduct.

Other methods of evasion of the law have also been attempted. A highly reputable merchant testified that he had been approached with a suggestion that one of his employees might be taken upon the salary list of a carrier if his firm would give its business to the road. A letter was produced written by a shipper to another carrier, asking to be placed in some such position, saying: "I will give to you the monopoly of all business controlled by me. I believe you have a right to employ any one to work for you on such terms as you see fit. I would not want to be known as your agent publicly;" and suggesting that about 2½ cents per cwt. would be a reasonable compensation. In these cases no bargain was made; but indications point strongly to the fact that secret inducements of that character have been resorted to. Of course, every such transaction is a violation of the Act to regulate commerce. The pretense of an employment or agency would not for a moment protect the carrier. There is reason for the belief that a critical inspection of pay-rolls, vouchers and sub-vouchers by the responsible officials of many roads would disclose to them a startling recklessness on the part of their subordinates.

The same may be said of an intimation which one witness stated had been made to him—that while no rebates could be given upon shipments after April 5, 1887, yet if he would furnish a list of one hundred cars shipped prior to that time they could be taken up for rebating upon new freight being received of like amount. Such a transaction, if carried into effect, would have resulted in a clear violation of the law. Other devices and evasions have been suggested as possible, and perhaps actual. It is enough at present to say that while a certain class of men, who are found among shippers as well as among the representatives of the carriers, find it extremely difficult to deal honorably and justly with the subject of transportation, yet the enactment of the statutory prohibition of unjust discrimination has resulted in very great progress in the direction of their extermination; and in every case of such illegal favoritism, any party having knowledge or information of the facts is permitted to submit the matter to the consideration of the Interstate Commerce Commission or of the Federal courts.

Recurring again to the subject of underbilling, it is found that it has not been confined to shipments of grain. Another industry which has been quite disastrously affected is the packing business. A gentleman whose observation convinced him that discrimination existed which was seriously prejudicial to the pork packers of Chicago, for the purpose of developing the facts, purchased a car-load of lard from an Omaha packing company. The price agreed upon was seven dollars and thirty-five cents, delivered in Chicago. It was shipped on February 13, 1888. The lard weighed 40,074 pounds. Freight was collected at 12 cents per hundred on 30,000 pounds only. The invoice to the purchaser showed the whole transaction, charging him with 40,074 pounds of lard at the agreed price, less the freight on 30,000 pounds, and the balance was drawn for at sight.

Further investigation disclosed facts as follows: At South Omaha, Nebraska, are situated several very extensive packing establishments. Their output is some 300 cars per day, distributed among the Chicago, Burlington and Quincy, Chicago and Northwestern, Chicago, Milwaukee and St. Paul, Chicago, Rock Island and Pacific, Wabash, and Missouri Pacific railroads. Their shipments consist of dressed hogs and dressed beef, packing-house products of various kinds, and everything that is produced from slaughtered animals, including fertilizers made from the offal. It has been the custom of carriers receiving car-load shipments upon side tracks entering all of said establishments to accept the weights given by the shippers without any examination or verification. The natural result of that custom is seen in the lard shipment mentioned above. The same methods have been general upon all kinds of shipments by all of said concerns upon all of said roads. The manufacturers load the cars and give to the agent of the carrier a slip, from which the way-bills are made out. The carriers individually, for reasons in part indicated above, have hesitated to take any measures to revise the weights.

A peculiar difficulty in this instance is found in the fact that large quantities of ice accompany the shipments, which is required for the preservation of the property and for

which no freight is charged, but which is constantly wasting and is at times replenished in transit, so that the car-load weight of loaded refrigerator cars cannot be accurately taken. It further appears that in some cases cars have been sent from South Omaha directly to the Chicago warehouses of the shippers, where they were unloaded upon private side tracks and returned billed as empty; an accidental examination disclosed that they were in fact loaded with nails, lumber, salt and other supplies needed at the packing-houses. In the case of lard or grease one method of shipment is in tank cars, which are estimated and billed at 20,000 pounds each, but which, in fact, contain nearer 30,000 pounds, or even more. There is no probability that such underbilling has been confined to the packing establishments at Omaha. In such cases rival houses soon discover what is going on and insist upon like opportunities. Unless they are permitted the business which is discriminated against cannot live.

The Western Association of railroads has attempted a reform; a paper was prepared, reading as follows:

“KANSAS CITY, November 29, 1887.

“We hereby agree to allow Mr. Carman, superintendent Western Railway Weighing Association, or his duly authorized representative, to inspect our books to verify our weights furnished to the several railroad companies on our bills of lading.”

In the course of the winter signatures were obtained representing all the packing-houses at Omaha, Kansas City, St. Joseph, Sioux City, Nebraska City, Des Moines, Ottumwa and Lincoln. The arrangement went into effect on March 1, 1888, and the experiment is now being tried. Its success remains to be demonstrated. The association is sanguine that it will result in uniformly honest billing. The Commission, however, hesitates to accept it as a satisfactory substitute for the performance by the carriers at initial points of their duty under the law, which involves the requirement by them that each shipper shall pay freight upon the exact amount of his shipment.

Underbilling is also practiced to a considerable extent in the shipment of merchandise in small lots. The following instances are taken from the inspection of freight delivered at the freight-houses in Chicago and St. Louis upon a single day, February 29, 1888:

Articles as named by con- signor.	Class.	Articles as found on ex- amination.	Class.
Bbl. pickles.....	4	Pickles in glass.....	1
Tanner's bark.....	3	Sassafras root.....	1
Box nested tin.....	2	Bird cages.....	D 1
Jute.....	4	Twine.....	1
Vinegar.....	4	Acetic acid.....	D 1
Dried fruit.....	4	Groceries.....	1
Candy.....	3	Chewing gum.....	1
Crockery.....	4	Glass bottles.....	2
Earthenware.....	4	Glassware.....	1
Burlaps.....	4	Cotton bags.....	1
Iron bolts.....	4	Hardware.....	2
Printing paper.....	3	Printed matter.....	1
Window glass.....	4	Looking-glass plate.....	1
Earth paint.....	4	Drugs.....	1

Many other examples were given in evidence, some of them of considerable importance; as where upon the destruction of a car loaded, as billed, with "wooden ware," a claim was presented for some eighteen hundred dollars, enumerating a large number of articles of merchandise, including brushes, drugs, stationery and even a parlor organ. Boxes of stationery have been billed as hardware upon the justification that they included one or two ink-erasers, &c. It is apparent from a collation of the proofs that there are merchants and shippers who habitually misrepresent the contents of the cases which they tender for transportation. When detected they simply pay the freight upon the bill of lading as corrected, which costs them nothing. When not detected they are so much ahead, and their honest neighbors suffer accordingly. An erroneous description of the freight is employed to reduce the classification, and in that way often operates to reduce the rate of freight one-third or even one-half. This practice has assumed such proportions that all of the "house freight" received at the larger western cities is now opened and examined. Delay and annoyance results,

but the increased revenue seems to justify the carriers in taking these precautions. In very many instances, especially on the part of large shippers and in the case of persistent repetitions, the misrepresentation is apparently willful and with deliberate attempt to deceive and defraud the carrier. No remedy for such cases is found, as the law now stands, beyond the collection of the amount which is required to transport the article when truly named. As early as 1845 a statute was passed in England imposing a penalty upon a shipper who fails to produce an exact account of his shipment with intent to avoid the payment of tolls. This statute imposed a penalty not exceeding five pounds sterling per ton upon the freight in question in addition to the regular toll. The existence of such a law has no doubt operated efficiently in preventing such a state of affairs as is now found to exist in this country.

It is not the desire or the purpose of the Commission to relax in the least degree those requirements of the Act to regulate commerce which hold carriers to a rigid responsibility for putting an end to all unjust discriminations and all undue or unreasonable preferences. It is the duty of the carriers to permit nothing whatever which can be construed as subjecting any person or locality "to any undue or unreasonable prejudice or disadvantage in any respect whatever." The application of these obligations to the carriers in various respects has been indicated above. It is clear that they have hitherto been seriously remiss; and while keeping within the letter of the inhibitions against "special rates, rebates and drawbacks," they have permitted, if not encouraged, the adoption and employment of other devices, especially the various forms of underbilling, which have indirectly produced the same result. A halt has now been called, and a serious effort is making on the part of very many of the roads to put an end to this vicious practice. The result will be closely observed, not only in respect to the particular cases mentioned above, but also upon many other kinds of traffic to which the attention of the Commission has been called.

Section 10 of the Act to regulate commerce provides that any common carrier subject to the provisions of the Act, or any director, officer, agent, &c., thereof, who shall wilfully do or cause to be done, or shall willingly suffer or permit to be done, anything in said Act prohibited, etc., shall be deemed guilty of a misdemeanor and punished accordingly. It is proposed to amend the Act by imposing a moderate penalty upon shippers who, by false billing, false classification, false weighing, or false report of weight, or by other devices, knowingly and wilfully obtain transportation for their property at less than the regular rates. In view of the fact that unscrupulous persons are to be found in mercantile pursuits as well as in the employment of the railroads; that unjust discriminations obtained by means of these devices invariably operate to the direct pecuniary advantage of some shipper or consignee, that the evidence distinctly shows various instances and methods by which shippers have been able deliberately to defraud a carrier in the matter of transportation, without fault or connivance on the part of the latter, and of the various other facts and considerations apparent in the foregoing pages, the proposed amendment is clearly necessary to make the Act more thoroughly efficient.

No manner is perceived in which the enforcement of such legislation can operate to the prejudice of honest shippers. Underbilling, in its devices and its fruits, must necessarily be participated in by the owner of the goods; it cannot be absolutely put down by imposing penalties upon the carriers alone. The complete termination of this practice is exceedingly to be desired, and there can be no doubt that this end will be greatly promoted by legislative recognition of the fact that not only the carrier but the shipper also, who both participate in the methods and the results of unjust discrimination, are each responsible to the public for the wrong which every such transaction involves.

IN RE FILING OF JOINT TARIFFS.

CIRCULAR No. 6.

FEBRUARY 13, 1888.

Roads located wholly in one State or Territory, which interchange freight or passenger traffic with connections to or from points outside of such State or Territory on through tickets or bills of lading, should file tariffs covering such traffic with the Commission.

If such through rates are made by the addition of local rates to the rates of connecting roads, such local tariffs should be filed with the Commission, together with a statement that through interstate rates are made by adding such local rates to the rates of the carrier (naming it) with which connection is made.

If joint rates are made on any basis other than by the addition of the local rates to the through rates of connecting carriers, tariffs showing such rates should be filed with the Commission covering all interstate business transacted thereunder.

For the Commission :

C. C. McCain,
Auditor.

IN RE PUBLICATION OF EXPORT TARIFFS.

At a Meeting of the INTERSTATE COMMERCE COMMISSION held in the City of Washington on the 8th day of March, 1888.

Present : ALL THE COMMISSIONERS.

The subject of the publication of Joint Tariffs being under consideration, the following preamble and order were unanimously adopted, and directed to be sent to all common carriers subject to the Act to regulate commerce :

WHEREAS section 6 of the Act to regulate commerce authorizes the Commission to direct when Joint Tariffs shall be made public, and to prescribe the measure of publicity to be given to the same :

IT IS ORDERED as follows :

Every tariff of rates and charges which a common carrier subject to the provisions of the Act to regulate commerce, by itself or jointly with one or more other carriers, whether such carriers are or are not subject to such act, shall establish for the transportation of grain, flour, meal, meats, provisions, lard, tallow, canned goods, cotton, tobacco, live stock or other articles of customary export, from any point within the United States to a seaport thereof, or to any point in or on the boundary of an adjacent country, or to any foreign port or place, is required to be filed with the Commission and shall be made public.

In all cases where a tariff is established for such merchandise billed or intended for export by sea, and ocean rates are not specified, either because of their fluctuation or for any other reason, so that only the charge for inland transporta-

tion is definitely fixed, the tariff as filed and made public shall show the rate charged by the inland carrier or carriers to the point of export, including all terminal charges or expenses, and shall also show in what manner the through rate to the point of ultimate destination is to be determined, whether by the addition of the ocean rate from time to time prevailing, or how otherwise. When the rate is a gross sum for the transportation of freight from a point within the United States to a port or place in a foreign country, the tariff as filed and made public shall in every case show what part of the whole is allowed to the carrier or carriers for inland transportation to the point of export by sea, including all terminal expenses or charges; and if such part is subject to be increased or diminished, contingently or otherwise, or if in any other case the charge for inland transportation is subjected to any change or modification in case the property carried is exported, the fact, and the manner in which the increase, diminution, or change is to be determined, and the extent thereof, shall be stated.

Every such tariff of rates and charges shall be published by plainly printing the same in large type of at least the size of ordinary pica, and copies thereof shall be kept for the use of the public in such places and in such form that they can be conveniently inspected, at every depot or station of any carrier making or issuing the same at which any traffic to which it relates is received or delivered.

This order shall become operative on March 20, 1888.

A TRUE COPY:

EDW. A. MOSELEY,

THE INTERSTATE COMMERCE ACT.

An act to regulate commerce.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the provisions of this act shall apply to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used, under a common control, management, or arrangement, for a continuous carriage or shipment from one State or Territory of the United States, or the District of Columbia, to any other State or Territory of the United States, or the District of Columbia, or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States, and also to the transportation in like manner of property shipped from any place in the United States to a foreign country and carried from such place to a port of trans-shipment, or shipped from a foreign country to any place in the United States and carried to such place from a port of entry either in the United States or an adjacent foreign country: *Provided*, That the provisions of this act shall not apply to the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property, wholly within one State, and not shipped to or from a foreign country from or to any State or Territory as aforesaid.*

The term "railroad" as used in this act shall include all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any corporation operating a railroad, whether owned or operated under a contract, agreement, or lease; and the term "transportation" shall include all instrumentalities of shipment or carriage.

All charges made for any service rendered or to be ren-

dered in the transportation of passengers or property as aforesaid, or in connection therewith, or for the receiving, delivering, storage, or handling of such property, shall be reasonable and just; and every unjust and unreasonable charge for such service is prohibited and declared to be unlawful.

SEC. 2. That if any common carrier subject to the provisions of this act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful.

SEC. 3. That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

Every common carrier subject to the provisions of this act shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers and property to and from their several lines and those connecting therewith, and shall not discriminate in their rates and charges between such connecting lines; but this shall not be construed as requiring any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business.

SEC. 4. That it shall be unlawful for any common carrier subject to the provisions of this act to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance; but this shall not be construed as authorizing any common carrier within the terms of this act to charge and receive as great compensation for a shorter as for a longer distance: *Provided, however,* That upon application to the Commission appointed under the provisions of this act, such common carrier may, in special cases, after investigation by the Commission, be authorized to charge less for longer than for shorter distances for the transportation of passengers or property; and the Commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section of this act.

SEC. 5. That it shall be unlawful for any common carrier subject to the provisions of this act to enter into any contract, agreement or combination with any other common carrier or carriers for the pooling of freights of different and competing railroads, or to divide between them the aggregate or net proceeds of the earnings of such railroads, or any portion thereof; and in any case of an agreement for the pooling of freights as aforesaid, each day of its continuance shall be deemed a separate offense.

SEC. 6. That every common carrier subject to the provisions of this act shall print and keep for public inspection schedules showing the rates and fares and charges for the transportation of passengers and property which any such common carrier has established and which are in force at the time upon its railroad, as defined by the first section of this act. The schedules printed as aforesaid by any such common carrier shall plainly state the places upon its railroad, between which property and passengers will be carried, and shall contain the classification of freight in force upon such

railroad, and shall also state separately the terminal charges and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates and fares and charges. Such schedules shall be plainly printed in large type, of at least the size of ordinary pica, and copies for the use of the public shall be kept in every depot or station upon any such railroad, in such places and in such form that they can be conveniently inspected.

Any common carrier subject to the provisions of this act receiving freight in the United States to be carried through a foreign country to any place in the United States shall also in like manner print and keep for public inspection, at every depot where such freight is received for shipment, schedules showing the through rate established and charged by such common carrier to all points in the United States beyond the foreign country to which it accepts freight for shipment; and any freight shipped from the United States through a foreign country into the United States, the through rate on which shall not have been made public as required by this act, shall, before it is admitted into the United States from said foreign country, be subject to customs duties as if said freight were of foreign production; and any law in conflict with this section is hereby repealed.

No advance shall be made in the rates, fares, and charges which have been established and published as aforesaid by any common carrier in compliance with the requirements of this section, except after ten days' public notice, which shall plainly state the changes proposed to be made in the schedule then in force, and the time when the increased rates, fares, or charges will go into effect; and the proposed changes shall be shown by printing new schedules, or shall be plainly indicated upon the schedules in force at the time and kept for public inspection. Reductions in such published rates, fares, or charges may be made without previous public notice; but whenever any such reduction is made, notice of the same shall immediately be publicly posted and the changes made shall immediately be made public by printing new schedules, or shall immediately be plainly indicated upon the schedules at the time in force and kept for public inspection.

And when any such common carrier shall have established and published its rates, fares, and charges in compliance with the provisions of this section, it shall be unlawful for such common carrier to charge, demand, collect, or receive from any person or persons a greater or less compensation for the transportation of passengers or property, or for any services in connection therewith, than is specified in such published schedule of rates, fares, and charges as may at the time be in force.

Every common carrier subject to the provisions of this act shall file with the Commission hereinafter provided for copies of its schedules of rates, fares, and charges which have been established and published in compliance with the requirements of this section, and shall promptly notify said Commission of all changes made in the same. Every such common carrier shall also file with said Commission copies of all contracts, agreements, or arrangements with other common carriers in relation to any traffic affected by the provisions of this act to which it may be a party. And in cases where passengers and freight pass over continuous lines or routes operated by more than one common carrier, and the several common carriers operating such lines or routes establish joint tariffs of rates or fares or charges for such continuous lines or routes, copies of such joint tariffs shall also, in like manner, be filed with said Commission. Such joint rates, fares, and charges on such continuous lines so filed as aforesaid shall be made public by such common carriers when directed by said Commission, in so far as may, in the judgment of the Commission, be deemed practicable; and said Commission shall from time to time prescribe the measure of publicity which shall be given to such rates, fares, and charges, or to such part of them as it may deem it practicable for such common carriers to publish, and the places in which they shall be published; but no common carrier party to any such joint tariff shall be liable for the failure of any other common carrier party thereto to observe and adhere to the rates, fares, or charges thus made and published.

If any such common carrier shall neglect or refuse to file or publish its schedules or tariffs of rates, fares, and charges

as provided in this section, or any part of the same such common carrier shall, in addition to other penalties herein prescribed, be subject to a writ of mandamus, to be issued by any circuit court of the United States in the judicial district wherein the principal office of said common carrier is situated or wherein such offense may be committed, and if such common carrier be a foreign corporation, in the judicial circuit wherein such common carrier accepts traffic and has an agent to perform such service, to compel compliance with the aforesaid provisions of this section; and such writ shall issue in the name of the people of the United States, at the relation of the Commissioners appointed under the provisions of this act; and failure to comply with its requirements shall be punishable as and for a contempt; and the said Commissioners, as complainants, may also apply, in any such circuit court of the United States, for a writ of injunction against such common carrier, to restrain such common carrier from receiving or transporting property among the several States and Territories of the United States, or between the United States and adjacent foreign countries, or between ports of trans-shipment and of entry and the several States and Territories of the United States, as mentioned in the first section of this act, until such common carrier shall have complied with the aforesaid provisions of this section of this act.

SEC. 7. That it shall be unlawful for any common carrier subject to the provisions of this act to enter into any combination, contract, or agreement, expressed or implied, to prevent, by change of time schedule, carriage in different cars, or by other means or devices, the carriage of freights from being continuous from the place of shipment to the place of destination; and no break of bulk, stoppage, or interruption made by such common carrier shall prevent the carriage of freights from being and being treated as one continuous carriage from the place of shipment to the place of destination, unless such break, stoppage, or interruption was made in good faith for some necessary purpose, and without any intent to avoid or unnecessarily interrupt such continuous carriage or to evade any of the provisions of this act.

SEC. 8. That in case any common carrier subject to the provisions of this act shall do, cause to be done, or permit to be done any act, matter, or thing in this act prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this act required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this act, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case.

SEC. 9. That any person or persons claiming to be damaged by any common carrier subject to the provisions of this act may either make complaint to the Commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this act, in any district or circuit court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt. In any such action brought for the recovery of damages the court before which the same shall be pending may compel any director, officer, receiver, trustee, or agent of the corporation or company defendant in such suit to attend, appear, and testify in such case, and may compel the production of the books and papers of such corporation or company party to any such suit; the claim that any such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such witness from testifying, but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding.

SEC. 10. That any common carrier subject to the provisions of this act, or, whenever such common carrier is a corporation, any director or officer thereof, or any receiver, trustee, lessee, agent, or any person acting for or employed by

such corporation, who, alone or with any other corporation, company, person, or party, shall wilfully do or cause to be done, or shall willingly suffer or permit to be done, any act, matter, or thing in this act prohibited or declared to be unlawful, or who shall aid or abet therein, or shall wilfully omit or fail to do any act, matter, or thing in this act required to be done, or shall cause or willingly suffer or permit any act, matter, or thing so directed or required by this act to be done not to be so done, or shall aid or abet any such omission or failure, or shall be guilty of any infraction of this act, or shall aid or abet therein, shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof in any district court of the United States within the jurisdiction of which such offense was committed, be subject to a fine of not to exceed five thousand dollars for each offense.

SEC. 11. That a Commission is hereby created and established to be known as the Interstate Commerce Commission, which shall be composed of five Commissioners, who shall be appointed by the President, by and with the advice and consent of the Senate. The Commissioners first appointed under this act shall continue in office for the term of two, three, four, five, and six years, respectively, from the first day of January, Anno Domini eighteen hundred and eighty-seven, the term of each to be designated by the President; but their successors shall be appointed for terms of six years, except that any person chosen to fill a vacancy shall be appointed only for the unexpired time of the Commissioner whom he shall succeed. Any Commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office. Not more than three of the Commissioners shall be appointed from the same political party. No person in the employ of or holding any official relation to any common carrier subject to the provisions of this act, or owning stocks or bonds thereof, or who is in any manner pecuniarily interested therein, shall enter upon the duties of or hold such office. Said Commissioners shall not engage in any other business, vocation or employment. No vacancy in the Commission shall impair the right of the remaining Commissioners to exercise all the powers of the Commission.

SEC. 12. That the Commission hereby created shall have authority to inquire into the management of the business of all common carriers subject to the provisions of this act, and shall keep itself informed as to the manner and method in which the same is conducted, and shall have the right to obtain from such common carriers full and complete information necessary to enable the Commission to perform the duties and carry out the object for which it was created; and for the purposes of this act the Commission shall have power to require the attendance and testimony of witnesses and the production of all books, papers, tariffs, contracts, agreements, and documents relating to any matter under investigation, and to that end, may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of books, papers, and documents under the provisions of this section.

And any of the circuit courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any common carrier subject to the provisions of this act, or other person, issue an order requiring such common carrier or other person to appear before said Commission (and produce books and papers if so ordered) and give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof. The claim that any such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such witness from testifying; but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding.

SEC. 13. That any person, firm, corporation, or association, or any mercantile, agricultural, or manufacturing society, or any body politic or municipal organization complaining of anything done or omitted to be done by any common carrier subject to the provisions of this act in contravention of the provisions thereof, may apply to said Commission by petition, which shall briefly state the facts; whereupon a statement of the charges thus made shall be forwarded by

the Commission to such common carrier, who shall be called upon to satisfy the complaint or to answer the same in writing within a reasonable time, to be specified by the Commission. If such common carrier, within the time specified, shall make reparation for the injury alleged to have been done, said carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper.

Said Commission shall in like manner investigate any complaint forwarded by the railroad commissioner or railroad commission of any State or Territory, at the request of such commissioner or commission, and may institute any inquiry on its own motion in the same manner and to the same effect as though complaint had been made.

No complaint shall at any time be dismissed because of the absence of direct damage to the complainant.

SEC. 14. That whenever an investigation shall be made by said Commission, it shall be its duty to make a report in writing in respect thereto, which shall include the findings of fact upon which the conclusions of the Commission are based, together with its recommendation as to what reparation, if any, should be made by the common carrier to any party or parties who may be found to have been injured; and such findings so made shall thereafter, in all judicial proceedings, be deemed *prima facie* evidence as to each and every fact found.

All reports of investigations made by the Commission shall be entered of record, and a copy thereof shall be furnished to the party who may have complained, and to any common carrier that may have been complained of.

SEC. 15. That if in any case in which an investigation shall be made by said Commission it shall be made to appear to

the satisfaction of the Commission, either by the testimony of witnesses or other evidence, that anything has been done or omitted to be done in violation of the provisions of this act, or of any law cognizable by said Commission, by any common carrier, or that any injury or damage has been sustained by the party or parties complaining, or by other parties aggrieved in consequence of any such violation, it shall be the duty of the Commission to forthwith cause a copy of its report in respect thereto to be delivered to such common carrier, together with a notice to said common carrier to cease and desist from such violation, or to make reparation for the injury so found to have been done, or both, within a reasonable time to be specified by the Commission; and if, within the time specified, it shall be made to appear to the Commission that such common carrier has ceased from such violation of law, and has made reparation for the injury found to have been done, in compliance with the report and notice of the Commission, or to the satisfaction of the party complaining, a statement to that effect shall be entered of record by the Commission, and the said common carrier shall thereupon be relieved from further liability or penalty for such particular violation of law.

SEC. 16. That whenever any common carrier, as defined in and subject to the provisions of this act, shall violate or refuse or neglect to obey any lawful order or requirement of the Commission in this act named, it shall be the duty of the Commission, and lawful for any company or person interested in such order or requirement, to apply, in a summary way, by petition, to the circuit court of the United States sitting in equity in the judicial district in which the common carrier complained of has its principal office, or in which the violation or disobedience of such order or requirement shall happen, alleging such violation or disobedience as the case may be; and the said court shall have power to hear and determine the matter, on such short notice to the common carrier complained of as the court shall deem reasonable; and such notice may be served on such common carrier, his or its officers, agents, or servants, in such manner as the court shall

direct; and said court shall proceed to hear and determine the matter speedily as a court of equity, and without the formal pleadings and proceedings applicable to ordinary suits in equity, but in such manner as to do justice in the premises; and to this end such court shall have power, if it think fit, to direct and prosecute, in such mode and by such persons as it may appoint, all such inquiries as the court may think needful to enable it to form a just judgment in the matter of such petition; and on such hearing the report of said Commission shall be *prima facie* evidence of the matters therein stated; and if it be made to appear to such court, on such hearing or on report of any such person or persons, that the lawful order or requirement of said Commission drawn in question has been violated or disobeyed, it shall be lawful for such court to issue a writ of injunction or other proper process, mandatory or otherwise, to restrain such common carrier from further continuing such violation or disobedience of such order or requirement of said Commission, and enjoining obedience to the same; and in case of any disobedience of any such writ of injunction or other proper process, mandatory or otherwise, it shall be lawful for such court to issue writs of attachment, or any other process of said court incident or applicable to writs of injunction or other proper process, mandatory or otherwise, against such common carrier, and if a corporation, against one or more of the directors, officers, or agents of the same, or against any owner, lessee, trustee, receiver, or other person failing to obey such writ of injunction or other proper process, mandatory or otherwise; and said court may, if it shall think fit, make an order directing such common carrier or other person so disobeying such writ of injunction or other proper process, mandatory or otherwise, to pay such sum of money not exceeding for each carrier or person in default the sum of five hundred dollars for every day after a day to be named in the order that such carrier or other person shall fail to obey such injunction or other proper process, mandatory or otherwise; and such moneys shall be payable as the court shall direct, either to the party complaining, or into court to abide the ultimate decision of the court, or into the

Treasury; and payment thereof may, without prejudice to any other mode of recovering the same, be enforced by attachment or order in the nature of a writ of execution, in like manner as if the same had been recovered by a final decree *in personam* in such court. When the subject in dispute shall be of the value of two thousand dollars or more, either party to such proceeding before said court may appeal to the Supreme Court of the United States, under the same regulations now provided by law in respect of security for such appeal; but such appeal shall not operate to stay or supersede the order of the court or the execution of any writ or process thereon; and such court may, in every such matter, order the payment of such costs or counsel fees as shall be deemed reasonable. Whenever any such petition shall be filed or presented by the Commission, it shall be the duty of the district attorney, under the direction of the Attorney-General of the United States, to prosecute the same; and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States. For the purposes of this act, excepting its penal provisions, the circuit courts of the United States shall be deemed to be always in session.

SEC. 17. That the Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice. A majority of the Commission shall constitute a quorum for the transaction of business, but no Commissioner shall participate in any hearing or proceeding in which he has any pecuniary interest. Said Commission may, from time to time, make or amend such general rules or orders as may be requisite for the order and regulation of proceedings before it, including forms of notices and the service thereof, which shall conform, as nearly as may be, to those in use in the courts of the United States. Any party may appear before said Commission and be heard, in person or by attorney. Every vote and official act of the Commission shall be entered of record, and its proceedings shall be public upon the request of either party interested. Said Commission shall have an official seal, which

shall be judicially noticed. Either of the members of the Commission may administer oaths and affirmations.

SEC. 18. That each Commissioner shall receive an annual salary of seven thousand five hundred dollars, payable in the same manner as the salaries of judges of the courts of the United States. The Commission shall appoint a secretary, who shall receive an annual salary of three thousand five hundred dollars, payable in like manner. The Commission shall have authority to employ and fix the compensation of such other employees as it may find necessary to the proper performance of its duties, subject to the approval of the Secretary of the Interior.

The Commission shall be furnished by the Secretary of the Interior with suitable offices and all necessary office supplies. Witnesses summoned before the Commission shall be paid the same fees and mileage that are paid witnesses in the courts of the United States.

All of the expenses of the Commission, including all necessary expenses for transportation incurred by the Commissioners, or by their employees under their orders, in making any investigation in any other places than in the city of Washington, shall be allowed and paid, on the presentation of itemized vouchers therefor approved by the chairman of the Commission and the Secretary of the Interior.

SEC. 19. That the principal office of the Commission shall be in the city of Washington, where its general sessions shall be held; but whenever the convenience of the public or of the parties may be promoted or delay or expense prevented thereby, the Commission may hold special sessions in any part of the United States. It may, by one or more of the Commissioners, prosecute any inquiry necessary to its duties, in any part of the United States, into any matter or question of fact pertaining to the business of any common carrier subject to the provisions of this act.

SEC. 20. That the Commission is hereby authorized to require annual reports from all common carriers subject to the

provisions of this act, to fix the time and prescribe the manner in which such reports shall be made, and to require from such carriers specific answers to all questions upon which the Commission may need information. Such annual reports shall show in detail the amount of capital stock issued, the amounts paid therefor, and the manner of payment for the same; the dividends paid, the surplus fund, if any, and the number of stockholders; the funded and floating debts and the interest paid thereon; the cost and value of the carrier's property, franchises, and equipment; the number of employees and the salaries paid each class; the amounts expended for improvements each year, how expended, and the character of such improvements; the earnings and receipts from each branch of business and from all sources; the operating and other expenses; the balances of profit and loss; and a complete exhibit of the financial operations of the carrier each year, including an annual balance-sheet. Such reports shall also contain such information in relation to rates or regulations concerning fares or freights, or agreements, arrangements, or contracts with other common carriers, as the Commission may require; and the said Commission may, within its discretion, for the purpose of enabling it the better to carry out the purposes of this act, prescribe (if in the opinion of the Commission it is practicable to prescribe such uniformity and methods of keeping accounts) a period of time within which all common carriers subject to the provisions of this act shall have, as near as may be, a uniform system of accounts, and the manner in which such accounts shall be kept.

SEC. 21. That the Commission shall, on or before the first day of December in each year, make a report to the Secretary of the Interior, which shall be by him transmitted to Congress, and copies of which shall be distributed as are the other reports issued from the Interior Department. This report shall contain such information and data collected by the Commission as may be considered of value in the determination of questions connected with the regulation of commerce, together with such recommendations as to additional

legislation relating thereto as the Commission may deem necessary.

SEC. 22. That nothing in this act shall apply to the carriage, storage, or handling of property free or at reduced rates for the United States, State, or municipal governments, or for charitable purposes, or to or from fairs and expositions for exhibition thereat, or the issuance of mileage, excursion, or commutation passenger tickets; nothing in this act shall be construed to prohibit any common carrier from giving reduced rates to ministers of religion; nothing in this act shall be construed to prevent railroads from giving free carriage to their own officers and employees, or to prevent the principal officers of any railroad company or companies from exchanging passes or tickets with other railroad companies for their officers and employees; and nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies. *Provided*, That no pending litigation shall in any way be affected by this act.

SEC. 23. That the sum of one hundred thousand dollars is hereby appropriated for the use and purposes of this act for the fiscal year ending June thirtieth, Anno Domini eighteen hundred and eighty-eight, and the intervening time anterior thereto.

SEC. 24. That the provisions of sections eleven and eighteen of this act, relating to the appointment and organization of the Commission herein provided for, shall take effect immediately, and the remaining provisions of this act shall take effect sixty days after its passage.

Approved, February 4, 1887.

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1. MUST BE SUPPORTED BY PROOF.
Holbrook v. St. Paul, Minneapolis and Manitoba Railroad Company, 102.
Fulton v. Chicago, St. Paul, Minneapolis and Omaha Railroad Company, 104.
Harding v. same company, 104.
2. FORM OF.
See PETITION; PARTIES; AMENDMENT.
3. INVESTIGATION WHEN NO PERSONAL GRIEVANCE PROVED.
Smith v. Northern Pacific Railroad Company, 209.
4. WHEN NOT ADJUDICATED.—When after trial but before decision the defendant concedes the relief sought and reduces its tariff to the rates claimed by the petitioner, no order is required to be made by the Commission.
Manufacturers' and Jobbers' Union of Mankato v. Minneapolis and St. Louis R. R. Co. et al., 227.
5. WHEN NOT ENTERTAINED BY COMMISSION.—No reasonable ground appearing.
LaCrosse Manufacturers' and Jobbers' Union v. Chicago, Milwaukee and St. Paul Railway Company, 629.
Ottinger v. Southern Pacific Co. 144.

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- Manufacturers' and Jobbers' Union of Mankato v. Minneapolis and St. Louis R. R. Co. et al.*, 227.

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See JURISDICTION; LONG AND SHORT HAUL CLAUSE; ACT TO REGULATE COMMERCE; PRACTICE.

CONTRACTS.

1. ENFORCEMENT OF.—Not in the hands of the Commission, but left to the ordinary jurisdiction of the courts of law.
Traders' and Travellers' Union v. Philadelphia and Reading R. R. Co. 122.
2. CORRESPONDING OBLIGATIONS.—Contracts between railroad companies for the advantageous transaction of business at a given point involve corresponding obligations to the public.
Riddle, Dean & Company v. New York, Lake Erie and Western Railroad Company, 594.

COST OF CARRIAGE.

1. IS AN IMPORTANT FACT IN TRANSPORTATION CHARGES.
In re Louisville and Nashville Railroad Co. 31.
Boston Chamber of Commerce v. Lake Shore and Michigan So. R'y, 436.
Evans v. Oregon Railway and Navigation Co., 325. .
2. OF LONG HAUL TRAFFIC NOT TO BE IMPOSED ON LOCAL TRAFFIC.—*Id.*
3. DIFFICULTY OF DETERMINING.—*Id.*
4. ELEMENTS ENTERING INTO.
Report of Interstate Commerce Commission, 317.

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COUNSEL AND ATTORNEY'S FEES.

NOT AWARDED BY COMMISSION.—The Commission is not authorized to award the counsel and attorney's fees, which may be given by a court under the eighth section of the act.
Councill v. Western and Atlantic Railroad Company, 339.

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COMMISSION WILL NOT AWARD.—The Commission will not go into the question of money damages when the claim presented is in its nature an action for trespass, for the reason that defendant is constitutionally entitled to a trial by jury in such a case.
Councill v. Western and Atlantic Railroad Company, 339.
Heck & Petree v. East Tennessee, Va. and Ga. R. *et al.*, 495.
Riddle, Dean & Co. v. N. Y., Lake Erie, and Western R'y Co., 594.

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In re Procedure in cases at issue, 223.
Rule 9 (Amendment to), 4.

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Providence Coal Company v. Providence and Worcester Railroad Company, 107.

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See ABSTRACT QUESTIONS; BURDEN OF PROOF; COMPLAINT; INTERSTATE COMMERCE COMMISSION; RULES OF COMMISSION.

DISCRIMINATION.

See UNJUST DISCRIMINATION.

1. LICENSING.—The Commission cannot give authority to a carrier to permit special privileges to individuals or corporations, or to sanction any that are not in harmony with the Act to Regulate Commerce.

In re Iowa Barbed Steel Wire Co., 17.

In re Missouri Miller's Association, 20.

Traders' and Travellers' Union v. Phil. and Reading R. R. Co., 122.

2. THE ACT CANNOT BE SUSPENDED FOR THE BENEFIT OF PARTICULAR INDUSTRIES.—It is immaterial that a privilege asked for was formerly granted and was beneficial, if it is not permissible under the law as it now stands.—*Ib.*

3. WHAT MAY NOT BE UNJUST DISCRIMINATION.

Export Trade of Boston, 24.

4. DISCRIMINATION IN SALE OF THROUGH TICKETS.

See COMMISSIONS.

DISTRIBUTION OF CARS.

See UNJUST DISCRIMINATION; PREFERENCE AND ADVANTAGE.

Riddle, Dean & Company v. Pittsburgh and Lake Erie Railroad Company, 374, 490.

Riddle, Dean & Company v. New York, Lake Erie and Western Railroad Company, 594.

Riddle, Dean & Company v. Baltimore and Ohio Railroad Company, 608.

EMPLOYER.

RIGHT TO THE SERVICES OF AGENT EXCLUSIVELY.

See COMMISSIONS.

ENCOURAGEMENT OF INDUSTRIES.

NOT A REASON FOR UNJUST DISCRIMINATION.

In re Louisville and Nashville Railroad Co., 81.

See also MANUFACTURING COMPANIES.

EQUALITY.

See UNJUST DISCRIMINATION; PREFERENCE AND ADVANTAGE.

EVIDENCE.

1. **PROOF REQUIRED.**—When no evidence whatever is presented to sustain the allegations of a complaint which are denied by the answer, the case must be dismissed without prejudice.

Leonard v. Union Pacific Railway Co., 185.

2. **TO REBUT INFERENCE OF UNJUST DISCRIMINATION.**—Course of dealing between parties may be shown, and circumstances showing good faith and absence of unfriendly spirit.

Riddle, Dean & Company v. Baltimore and Ohio Railroad Company, 608.

3. **PRESUMPTION.**—If a railroad company avows a purpose to comply with the law, it must be assumed that it will do so, and is doing so, until there is evidence that the purpose is not lived up to.

Holbrook v. St. Paul, Minneapolis and Manitoba R. R. Co., 102.

See BURDEN OF PROOF; DEPOSITIONS.

EX PARTE APPLICATIONS.

See ABSTRACT QUESTIONS.

EXPORT TARIFFS.

ORDER IN RESPECT TO PUBLICATION OF.—658.

EXPRESS COMPANIES.

1. **STATUS OF UNDER ACT TO REGULATE COMMERCE.**

Report of Interstate Commerce Commission, 273.

2. **HOW RELATED TO THE ACT.**—The mere fact that a common carrier does other business besides the transportation of passengers and property, or performs a further service than that of transportation in respect to the articles carried, *Held*, not sufficient to exclude the carrier from the operation of the Act so far as applicable to its business.

In the Matter of the Express Companies, 349.

3. The relation of express companies to interstate commerce considered, together with the extent and measure of their participation therein. The bringing them within the provisions of the Act found practicable, and on some accounts desirable. *Ib.*
4. Express business conducted as a branch of the business of a railroad company, *Held* to be subject to the Act. *Ib.*
5. Express business conducted by an independent organization acquiring transportation rights by contract, *Held*, not to be described in the Act with sufficient precision to warrant the Commission in taking jurisdiction thereof. *Ib.*

FACILITIES OF TRAFFIC.

EQUALITY IN.

Chicago and Alton R. R. Co. v. Pennsylvania R. R. Co., 86.

Hock & Petree v. East Tennessee, Va. and Ga. R. R. Co., 495.

FACTS.

1. **FINDING OF.**—Not put upon record when case not presented with satisfactory precision, the force of the contest having been expended upon other points.

Burton Stock Car Co. v. C., B. and Q. R. R. *et al.*, 132.

2. THE REPORT AND FINDINGS of the Commission upon the evidence relates only to the ascertainment and presentation of all the material facts necessary to fairly and justly present the merits of the controversy. The Commission does not report evidence which is only cumulative, or which is immaterial or irrelevant, or mere details of evidence already embraced in substantial facts stated.

Riddle, Dean & Co. v. Pittsburgh and Lake Erie R. R. Co., 490.

FAST FREIGHT LINES.

CHARACTER OF.—Railroad companies over whose roads a fast freight line operates, and which divide its expenses and receipts, are responsible for its action in making and filing rates, and must at their peril see that its charges upon traffic over their roads are in conformity to law.

Vermont State Grange v. Boston and Lowell R. R. *et al.*, 159.

FISH COMMISSION.

TRANSPORTATION FOR.—The United States Commission of Fish and Fisheries being one of the agencies of the Government, and the distribution of fish and fish eggs by it being made by authority of the Government, the rate for such transportation is not necessarily governed by the published railroad tariffs, but special rates may be given under the exceptions in Sec. 22 of the Act. Whether the right exists to give free transportation to employees and agents of said Commission, *quere*.

In re U. S. Commission of Fish and Fisheries, 21.

FOURTH SECTION OF THE ACT.

See LONG AND SHORT HAUL CLAUSE.

FRAUDS.

UPON CARRIERS.

Report of Interstate Commerce Commission, 812.
In re Underbilling, 633.

FREE TRANSPORTATION.

QUESTIONS OF.

See PAGES 8, 21 and 28.

GRANGE.

MAY INSTITUTE PROCEEDINGS BEFORE COMMISSION.

Vermont State Grange v. Boston and Lowell R. R. *et al.*, 159.

GROUPING OF RATES.

SUBJECT CONSIDERED.

Report of Interstate Commerce Commission, 816.
La Crosse M. & J. Union v. Chicago, Milwaukee and St. Paul Railway Co., 629.

HEARINGS.

How Assigned and Conducted.—Rule VIII., 4.

In re Procedure in cases at issue, 223.

INDIAN SUPPLIES.

TRANSPORTATION OF.—Transportation of supplies needed for the Indian service is not required to be made at the regular published rates of the carrier.

In re Indian Supplies, 8.

INTERSTATE COMMERCE.

1. WHAT IS NOT.—Where the transportation is from one point to another in the same state it is not interstate traffic, even though it be intended to be taken up by another carrier and delivered in another state.

In re Mo. and Ill. R. R. Tie and Lumber Company v. The Cape Girardeau and Southwestern Railway Co., 30.

2. WHAT CONSTITUTES.—A railroad company, chartered by the State of Tennessee, owns a short road wholly in that State, but has never owned any rolling stock or operated its road; the road was used and operated as a means of conducting interstate traffic in coal by other companies owning connecting interstate roads. *Held*, that the short road thus used is one of the facilities and instrumentalities of interstate commerce, and the carriers using it are subject to the provisions of the Act to Regulate Commerce.

Heck & Petree v. East Tenn., Virginia and Georgia R. R., 495.

In respect to such traffic the duties of such carriers to the public are the same without regard to the ownership, or corporate control—the authority or means of its construction. *Ib.*

As one of the instrumentalities of shipment or carriage it must be accessible to all interstate shippers on equal and reasonable terms. The public cannot be deprived of this right by the separate or joint action of the carriers, and they cannot be permitted to use them for the purposes of discrimination between mine owners on its line. *Ib.*

See FILING OF JOINT TARIFFS, 657.

INTERSTATE COMMERCE COMMISSION.

1. ABSTRACT QUESTIONS WILL NOT BE ANSWERED.—The Commission will not in general give decisions or undertake to construe the statute on *ex parte* applications, 8, 17.
2. POWER UNDER FOURTH SECTION OF ACT LIMITED.—The Commission has no power under the statute to grant special privileges or to suspend the fourth section of the Act for the benefit of particular industries.
In re Iowa Barbed Steel Wire Company, 17.
In re St. Louis Millers' Association, 20.
3. RELIEF UNDER FOURTH SECTION.—The Commission will not make an order for relief under the fourth section of the Act, except upon verified petition and after an investigation into the facts.
In re Southern Pacific Railroad Company, 6.
In re Iowa Barbed Steel Wire Company, 17.
4. TARIFFS UNDER FOURTH SECTION.—The Commission does not consider it necessary or expedient to make formal suggestions in respect to the framing of tariffs.

In the Matter of the Tariffs of the Columbus and Western Railway Company, 626.

5. POWER OF UNDER FOURTH SECTION.—While authorized to permit exceptions under certain circumstances indicated, the Commission is not empowered in any case to require exceptions.

Thatcher v. Del. and Hudson Canal Co. et al., 153.

6. PETITION NOT NECESSARILY ENTERTAINED.—A petition will not be entertained when the result will obviously be its dismissal, in conformity with principles announced in a case already decided.

La Crosse Manufacturers' and Jobbers' Union v. Chicago, Milwaukee and St. Paul Railway Company, 629.

Petition not entertained when presented by a party having no apparent interest in the transaction, the affidavit of the real party being annexed.

Ottinger v. The Southern Pacific Co., 144.

7. INVESTIGATION BY.—Where one makes complaint under the Act to regulate commerce and sets up a personal grievance which he fails to prove the commission may, nevertheless, if a violation of law by the defendant appears, retain the case and take the necessary steps to bring such violation of law to an end.

Smith v. Northern Pacific Railroad Company, 209.

Boston and Albany R. R. Co. v. Boston and Lowell R. R. Co. et al., 158.

In re Underbilling, 633.

8. WHEN IT WILL NOT AWARD DAMAGES, OR COUNSEL OR ATTORNEYS' FEES.
Council v. Western and Atlantic Railroad Company, 839.

9. JURISDICTION STRICTLY STATUTORY.

In the matter of the Express Companies, 869.

10. ORDER NOT RETROACTIVE.

Farrar & Co. v. East Tenn., Virginia and Georgia R. R., 489.

See ACT TO REGULATE COMMERCE; PRACTICE; REPORT OF INTERSTATE COMMERCE COMMISSION.

ISSUES.

CANNOT BE DISPOSED OF WITHOUT EVIDENCE.

Leonard v. Union Pacific Railway Co., 185.

JOINT RATES.

See REASONABLE RATES.

JOINT TARIFFS.

1. PUBLICATION OF.

Order for, in certain cases, 5.

2. NEED NOT BE DUPLICATED.—On receipt of a written statement from each corporation acknowledging the authority of any association, committee or other traffic combination, to issue tariffs in its behalf, schedules filed by such association, etc., will be credited to each road in the organization which so requests.

In re Joint Tariffs and Schedules, 225.

3. FILING OF, WITH COMMISSION.

Report of Interstate Commerce Commission, 292.

4. EXPORT.

Order for publication of, 658.

5. CIRCULAR CONCERNING FILING.

By roads located wholly in one state, 657.

JURISDICTION.**1. WHAT GIVES JURISDICTION TO CONSTRUCT THE LAW.**

In re Southern Pacific Railroad Company, 6,

In re Order of Railway Conductors, 8.

In re Traders' and Travelers' Union, 8.

In re Iowa Barbed Steel Wire Company, 17.

In re St. Louis Millers' Association, 20.

In re Disabled Soldiers and Sailors, 28.

In re Mo. & Ill. R. R. Tie and Lumber Co. *v.* Cape Girardeau and Southwestern Railway Co., 30.

Traders' and Travellers' Union *v.* Phila. and Reading R. R. Co., 122.

Burton Stock Car Co. *v.* C., B. and Q. R. R. Co. *et al.*, 138.

Ottinger *v.* Southern Pacific Co., 144.

2. RESTRICTIONS UPON.—In cases where parties are constitutionally entitled to a trial by jury, the Commission will not go into the question of money damages.

Councill *v.* Western and Atlantic Railroad Company, 339.

See DAMAGES.

JURY TRIAL.

See DAMAGES.

LAND EXPLORERS' TICKETS.

UNJUST DISCRIMINATION.—The sale of land explorers' tickets and settlers' tickets at less than the regular rates charged to passengers at the usual ticket offices, as practiced by the Northern Pacific Railroad Company, is unjust discrimination.

Smith *v.* Northern Pacific Railroad Company, 208.

LITIGATION.

HOW RELATED TO PROCEEDING BEFORE COMMISSION.

See PENDING SUIT.

LIVE STOCK.**1. DUTY OF CARRIERS.**—The duty of carriers in respect to the transportation of live stock is not fully discharged by receiving and delivering the same at a depot access to which must be purchased.

Keith *v.* Kentucky Central R. R. *et al.*, 189.

2. USE OF YARDS.—When a carrier of live stock has undertaken to give to a stock yard company an exclusive right, with the privilege of charging lottage for the use of its yards, and complainants have established chutes of their own, adjacent to the track, through which they demand the right to receive and deliver stock for themselves and their customers;

Held, that the conveniences so furnished being suitable, their demands must be complied with.

3. PATENT STOCK CARS.—Transportation of live stock in, considered.
Burton Stock Car Co. v. Chicago, Burlington and Quincy R. R. Co. *et al.*, 132.

LOCAL TRAFFIC.

1. MAY BE CHARGED PROPORTIONATELY MORE THAN LONG HAUL TRAFFIC.
In re Louisville and Nashville Railroad Co., 81.
2. CANNOT BE BURDENED WITH COST OF LONG HAUL TRAFFIC.—*Id.*
3. RATES, HOW ADJUSTED.
Farrar v. East Tennessee, Virginia and Georgia R. R. Co., 480.
See REASONABLE RATES.

LONG AND SHORT HAUL CLAUSE.

1. EXCEPTIONS UNDER.—When a railroad claims that the circumstances and conditions of long and short hauls on its lines are so dissimilar as to justify its making the greater charge on the shorter haul, the Commission will not on its petition decide on the justice of its claim; but will leave it to take the initiative in fixing rates, and will decide upon their justice and propriety when complaint is made by persons or localities who consider themselves injured.
In re Louisville and Nashville Railroad Company, 81.
2. CONSTRUCTION OF.—On questions of statutory construction in such cases the Commission holds:
 - First. That the prohibition in the fourth section of the Act to regulate commerce against a greater charge for a shorter than for a longer distance over the same line in the same direction, the shorter being included in the longer distance, as qualified therein is limited to cases in which the circumstances and conditions are substantially similar.
 - Second.—That the phrase “under substantially similar circumstances and conditions” in the fourth section, is used in the same sense as in the second section; and under the qualified form of the prohibition in the fourth section carriers are required to judge in the first instance with regard to the similarity or dissimilarity of the circumstances and conditions that forbid or permit a greater charge for a shorter distance.
 - Third. That the judgment of carriers in respect to the circumstances and conditions is not final, but is subject to the authority of the Commission and of the courts to decide whether error has been committed, or whether the statute has been violated. And in case of complaint for violating the fourth section of the Act the burden of proof is on the carrier to justify any departure from the general rule prescribed by the statute, by showing that the circumstances and conditions are substantially dissimilar.
 - Fourth. That the provisions of section one, requiring charges to be reasonable and just, and of section two, forbidding unjust discrimination, apply when exceptional charges are made under section four as they do in other cases.
 - Fifth. That the existence of actual competition which is of controlling force, in respect to traffic important in amount, may make out the dissimilar circumstances and conditions entitling the carrier to charge less for the longer than for the shorter haul over the same line in the

same direction, the shorter being included in the longer in the following cases:

1. When competition is with carriers by water which are not subject to the provisions of the statute.
2. When competition is with foreign or other railroads which are not subject to the provisions of the statute.
3. In rare and peculiar cases of competition between railroads which are subject to the statute, when a strict application of the general rule of the statute would be destructive of legitimate competition.

Sixth. The Commission further decides that when a greater charge in aggregate is made for the transportation of passengers or the like kind of property for a shorter than for a longer distance over the same line in the same direction, the shorter being included in the longer distance, it is not sufficient justification therefor that the traffic which is subjected to such greater charge is way or local traffic, and that which is given the more favorable rates is not.

Nor is it sufficient justification for such greater charge that short-haul traffic is more expensive to the carrier, unless when the circumstances are such as to make it exceptionally expensive, or long-haul traffic exceptionally inexpensive, the difference being extraordinary and susceptible of definite proof.

Nor that the lesser charge on the longer haul has for its motive the encouragement of manufactures or some other branch of industry.

Nor that it is designed to build up business or trade centers.

Nor that the lesser charge on the longer haul is merely a continuation of the favorable rates under which trade centers or industrial establishments have been built up. The fact that long-haul traffic bears certain rates is no reason for carrying it for less than cost at the expense of other traffic.

In re Louisville and Nashville Railroad Company, 81.

3. APPLICATION OF.—The Commission will not make an order the effect of which would be to bring other rates into conflict with the fourth section of the Act to regulate commerce.

Thatcher v. Del. and Hudson Canal Co. et al., 153.

4. EXCEPTIONS UNDER.—Facts and considerations stated which are not regarded as sufficient to warrant the deviation from the rule of the fourth section found in certain tariffs.

In the Matter of the Tariffs of the Columbus and Western Railroad Company, 626.

5. PARTIES TO LONG HAUL RATES.—All companies forming a line for long-haul traffic are properly made defendants in petition charging violation of fourth section.

Boston and Albany R. R. Co. v. Boston and Lowell R. R. Co. et al., 159.

6. "OVER THE SAME LINE."—By the words "same line" a physical line is meant, not a mere business arrangement; and one piece of road may be part of several lines.—*Ib.*

6. FAST FREIGHT LINE.—The fact that the tariff for the long haul-traffic made by a fast freight line does not justify a violation of the section.—*Ib.*

8. COMPETITION.—The real and actual, not the possible competition are the circumstances which should be considered when such greater charges are in question.—*Ib.*

9. CIRCUITOUS ROUTE.—Under the circumstances stated, the fact that a line is long and circuitous and is obliged to make concessions in its charges in order to share in traffic, will not make out the dissimilar circumstances and conditions indicated by the fourth section.—*Ib.*

10. **WHAT DOES NOT VIOLATE.**—Rates named by a carrier do not violate the fourth section when it appears that on its own line the charges are greater for the longer distance, and the through charges by the shorter line are only made greater by the fact that the connecting road which has the shorter line makes higher rates than the connecting road which has the longer line.

Allen v. Louisville, New Albany and Chicago Railway Company, 219.

Case stated showing no violation of the long and short haul clause.—*Ib.*

11. **SEVERAL ROADS PARTICIPATING.**—Where the purpose of a complaint is to compel a reduction of through rates from a western point over several roads to a seaboard city, all the roads constituting the line should be parties.—*Ib.*

12. **WATER COMPETITION.**—Where the real competition for long haul traffic is by railroad, the fact that there is also possible water competition will not of itself constitute the dissimilar circumstances and conditions which will support greater charges on shorter than on longer hauls.

Boston and Albany R. R. Co. v. Boston and Lowell R. R. Co. *et al.*, 159.

The mere fact that a point is situated upon a navigable stream held not sufficient of itself to justify the lesser charge for a longer haul to such a point. Water competition to furnish such justification should be actual, of controlling force, and in respect to traffic important in amount.

Harwell v. Columbus and Western R. R. Co., 230.

13. **CONSTRUCTION OF CLAUSE STATED.**

Report of Interstate Commerce Commission, 282.

MANUFACTURING COMPANIES.

PRIVILEGES TO.—The Commission has no power to grant special privileges to them when the statute itself does not sanction it.

In re Iowa Barbed Steel Wire Company, 17.

In re St. Louis Millers' Association, 20.

MILEAGE OF CARS.

PRINCIPLES STATED.

Burton Stock Car Co. v. C., B. & Q. R. R. Co. *et al.*, 132.

MILEAGE TICKETS.

ISSUANCE OF.—Authorized by Section 22 of the Act to regulate commerce.

Larrison v. Chicago and Grand Trunk R'y Co., 147.

Associated Wholesale Grocers of St. Louis v. Missouri Pacific R'y Co., 156.

Authorization of does not relieve carriers from requirements of reasonableness and impartiality as to rates charged which are prescribed by other sections of the Act.—*Ib.*

Special contract limiting liability of carrier in mileage tickets to commercial travelers will not justify a lower rate than is charged the public, when same terms are not offered to all who will accept such special contracts.—*Ib.*

Must be sold impartially.—*Ib.*

MILLING IN TRANSIT.

1. **NO AUTHORITY TO COMPEL.**—Milling in transit having long been permitted by common carriers to millers at some points and a large quantity of the transits being said to be out which can be and are made use of to give the millers at Minneapolis an advantage in rates over those of St. Louis, the Commission cannot correct the wrong by giving or authorizing special rates to the St. Louis millers.

In re St. Louis Millers' Association, 20.

In re Iowa Barbed Steel Wire Company, 17.

2. **A FAVOR IN TRANSPORTATION.**—Whether or not the system known as "milling in transit" be objectionable under the Act to regulate commerce, it is clear that the Commission has no power to compel the granting of such a favor when the privilege would be in the nature of a concession to a particular locality.

Crews v. Richmond and Danville Railroad Company, 423.

La Crosse Manufacturers' and Jobbers' Union v. Chicago, Milwaukee and St. Paul Railway Co., 629.

OIL.

TRANSPORTATION OF.

See PREFERENCE AND ADVANTAGE; UNJUST DISCRIMINATION.

Rice v. Louisville and Nashville R. R. Co., 503.

PARALLEL LINES.

- RATES UPON.**—Corresponding advantages should be afforded patrons of parallel lines operated by the same carrier.

Boards of Trade Union of Farmington, etc. v. Chicago, Milwaukee and St. Paul Railway Company, 215.

PARTIES.

1. **PERSONAL INTEREST.**—One may complain on public grounds of a violation of the Act to regulate commerce which amounts to a public grievance, without having any personal interest to be affected by the violation except as one of the public.

Vermont State Grange v. Boston and Lowell R. R. *et al.*, 159.

2. **VOLUNTARY ASSOCIATION.**—A voluntary state association of persons engaged in an industrial pursuit may be complainant in proceedings charging a violation of the long and short haul clause of the Act.—*Id.*

3. **COMPLAINT UNDER FOURTH SECTION.**—All the roads constituting the line which makes the through rate complained of should be parties to a complaint which seeks to compel a reduction of such through rates.

Allen v. Louisville, New Albany and Chicago Railway Company, 199.

4. **ALL INTERESTED ENTITLED TO BE HEARD.**—Parties affected are entitled to be notified in case a change in rates is asked. No order correcting unjust discrimination made for want of proper parties; amendments allowed, etc.

Harwell v. Columbus and Western R. R. Co., 237.

5. **ABSENCE OF PARTY INTERESTED.**—Where the relation of any carrier to the matter complained of is such that it is in whole or in part materially responsible for the alleged grievance, and has direct interest in any investigation of the subject-matter involved, that carrier should be a party to the proceeding, and if not a party no relief can be given against it.

Riddle, Dean & Co. v. Pittsburgh and Lake Erie R. R., 490.

PASS SYSTEM, THE.

EVILS OF.

Report of Interstate Commerce Commission, 265.

PASSENGERS.

1. DISCRIMINATION IN SALE OF TICKETS.

Larrison *v.* Chicago and Grand Trunk Railway Company, 147.

Michigan Central Railroad Company *v.* Chicago and Grand Trunk Railway Company, 147.

Associated Wholesale Grocers of St. Louis *v.* Missouri Pacific Railroad Company, 156.

Smith *v.* Northern Pacific Railroad Company, 208.

2. COLORED PEOPLE.—May be properly assigned separate cars on equal terms. Such a separation of the races does not create undue prejudice or unjust preference.

Councill *v.* Western and Atlantic Railroad Company, 339.

Heard *v.* Georgia Railroad Company, 428.

Complainant, a colored man, paid the same fare as other first-class passengers, and it was only fair dealing and common honesty that he should have the security and convenience of travel for which his money had been taken. The fact being found that he did not, the defendant was held guilty of violation of the Act to regulate commerce.—*Ib.*

PENDING SUIT.

WHEN A DEFENCE.—Where a pending suit involves to some extent the question presented to the Commission, the pendency thereof will not be deemed sufficient reason for declining to make an order when it is seen that the judgment of the court will not necessarily cover the same ground as the petition.

Keith *v.* Kentucky Central R. R. *et al.*, 189.

Leave granted to apply for a modification of the order if found necessary to make it conform to the judgment in a pending suit, when the same shall be rendered.—*Ib.*

PETITION.

1. VERIFICATION AND PROOF OF.

In re Southern Pacific Railroad Company, 6.

2. PARTY IN INTEREST SHOULD MAKE COMPLAINT IN HIS OWN NAME.

Ottinger *v.* The Southern Pacific Co., 144.

See COMPLAINT: PRACTICE; RAILROAD COMPANY.

POOLING OF FREIGHTS.

SUBJECT CONSIDERED.

Report of Interstate Commerce Commission, 309.

PRACTICE.

1. EVIDENCE REQUIRED.—When issues of fact are presented a decision cannot be made without some evidence upon which to base it.

Leonard *v.* Union Pacific Railway Co., 185.

2. **ABANDONMENT OF PROCEEDING.**—Petitioner not appearing or being heard from after receiving copy of defendant's answer to his complaint, the Commission assumes that he is satisfied, and dismisses the case.
Jackson v. St. Louis, Arkansas and Texas R'y, 184.
3. **AFTER RELIEF CONCEDED.**—When after trial, but before decision, the defendant concedes the relief sought and reduces its tariff to the rates claimed by the petitioner, no order is made or opinion announced by the Commission; a report of the facts is made to complete the record of the case.
Manufacturers' and Jobbers' Union of Mankato v. Minneapolis and St. Louis R. R. Co. et al., 227.
4. **CASES AT ISSUE.**—Proceeding to be in the simplest form consistent with reasonable certainty; no replication required. When facts are not agreed upon, depositions may be taken on notice, and the work should be entered upon immediately after answer. Assignment for hearing made on request of either party. Parties will be heard orally or upon briefs, as they prefer.
In re Procedure in cases at issue, 223.
5. **QUESTIONS OF LAW.**—Dilatory pleadings considered objectionable and a single speedy hearing desired in every case; all proper questions will then be entertained, whether jurisdictional or relating to the merits of the controversy.
In re Procedure concerning questions of law, 224.
6. **COMPLAINT TO, AND ADJUDICATION BY, COMMISSION.**
Report of Interstate Commerce Commission, 295.
7. **ORDER CHANGING RATES NOT RETROACTIVE.**—After decision petitioners raised the question whether they were not entitled to have payments refunded which had been made in excess of the rate now fixed. *Held*, that an order changing the rate was not retroactive, but would reduce the rate from the time of promulgation only.
Farrar & Co. v. East Tenn., Virginia and Georgia R. R., 489.
8. **APPLICATION FOR RE-HEARING.**—The Commission will promptly and carefully examine an application for a re-hearing with a view to the immediate correction of an error of law or of fact found to exist, but will not direct a re-hearing unless satisfied that it might have the effect of changing the result of what the Commission has already done.
Riddle, Dean & Co. v. Pittsburgh and Lake Erie R. R., 490.
9. **DECISION AND REPORT.**—The Commission does not report evidence which is only cumulative, or which is immaterial or irrelevant, or mere details of evidence embraced in substantial facts stated.—*Id.*

The statute is construed as dealing with the substance of things and as contemplating speedy methods of procedure which come at once to the very right of questions arising in the transportation of persons and freight.—*Id.*

See **AMENDMENT; PARTIES; PETITION; RAILROAD COMPANY.**

PREFERENCE AND ADVANTAGE.

1. **WHEN UNDUE AND UNREASONABLE.**—Rates and charges not unreasonably high of themselves can be so adjusted in their relations to each other as to produce the undue preference and unreasonable advantage which the 3d section of the Act to regulate commerce makes unlawful.
Boards of Trades Union, etc. v. Chicago, Milwaukee and St. Paul R. Co., 215.

Raymond v. Chicago, Milwaukee and St. Paul R. R. Co., 230.

2. **MEASURE OF PROOF REQUIRED TO JUSTIFY.**—When water competition is brought forward as a justification of preference and advantage, the same measure of proof is required to overcome the presumption that such distinctions are undue and unreasonable which is required to work an exception under section 4 of the Act.

Harwell v. Columbus and Western R. R. Co., 236.

3. **COLORS PEOPLE.**—Colored people who buy first-class tickets must be furnished with accommodations equally safe and comfortable with other first-class passengers. A car furnished complainant found to be only second-class in comforts for travel, and *held* that he was thereby subjected to undue preference and unreasonable disadvantage, in violation of section three of the Act to regulate commerce.

Councill v. Western and Atlantic Railroad Company, 339.

Heard v. Georgia Railroad Company, 428.

4. **RAILROAD MATERIAL.**—A producer of railroad material (*e. g.* ties) is entitled to sell it when he wishes, in the best available market. Common carriers are forbidden to attempt to prevent this by applying disproportionate or unreasonable rates.

Reynolds v. Western New York and Pennsylvania Railway Company, 393.

5. **IN SHIPMENT OF COAL.**—The selection of either goods or customers is forbidden to common carriers. Less desirable traffic which is ordinarily the subject of transportation, and not dangerous to handle, must be accepted upon reasonable terms, as well as that which is more desirable.

Riddle, Dean & Company v. New York, Lake Erie and Western Railroad Company, 594.

See DISTRIBUTION OF CARS.

6. **TRANSPORTATION OF PETROLEUM OILS.**—When for a special traffic, *e. g.*, the transportation of petroleum oils, a carrier provides rolling stock for one method but does not provide it for another, for which it publishes rates, the terms on which such rolling stock is to be provided should be uniform and published with the rate sheets, and cannot lawfully be left to be the subject of bargain and different terms in the case of different shippers.

Rice v. Louisville and Nashville Railroad Co., 503.

When two methods for the transportation of an article of merchandise are nominally offered by the carrier, for only one of which it offers rolling stock, and for the other of which the shipper must supply his own rolling stock, at considerable expense, it cannot be said that the resorting to the latter by the shipper is so far a matter of choice that he has no concern in charges for transportation in the other mode; such charges should be relatively just and equal.—*Id.*

It is properly the business of a carrier by railroad to supply rolling stock for the freight he offers or proposes to carry; and if the diversities and peculiarities of traffic are such that this is not always practical, and the consignor is allowed to supply it for himself, the carrier must not allow its own deficiencies in this particular to be made the means of putting at unreasonable disadvantage those who may use in the same traffic all the facilities which it supplies.—*Id.*

See ACT TO REGULATE COMMERCE; UNJUST DISCRIMINATION.

PRESUMPTION.

See EVIDENCE.

PRIVILEGES.

1. **EXCLUSIVE.**—Common carriers not authorized to grant to a corporation exclusive privileges for handling live stock which involve the right to make a charge in addition to the transportation charges.

Keith v. Kentucky Central R. R. et al., 189.

2. **SPECIAL.**

See **INTERSTATE COMMERCE COMMISSION.**

QUESTIONS OF LAW.

How DISPOSED OF.

In re Procedure Concerning Questions of Law, 224.
Rule VI., 3.

RAILROAD COMPANY.

PETITION BY.—It is not a grievance of which a railroad company can complain on its own account that a competitor violates the fourth section of the Act, when such company is not interested in the short-haul traffic, and does not prove any connection between the high charges thereon and the low charges of the competitive traffic.

Boston and Albany R. R. Co. v. Boston and Lowell R. R. et al., 159.

It is not a valid reason for a railroad company to institute proceedings against another under the fourth section of the Act, that the complaining party desires to know whether the other is justified in making the high charges on short-haul traffic, in order that it may do the same.—*Ib.*

RAILWAY CONDUCTORS.

QUESTION OF FREE TRANSPORTATION FOR.

See **FREE TRANSPORTATION.**

RATES.

1. **GROUPING OF.**

Report of Interstate Commerce Commission, 316.

2. **DIPARITY IN.**

Ib., 317.

3. **UNSTEADINESS IN.**

Ib., 314.

4. **WARS OF.**

Ib., 315.

5. **INFORMATION CONCERNING.**—Duty of carriers in respect to furnishing precise information to the public concerning all matters affecting rates and charges in transportation, stated.

Rice v. Louisville and Nashville R. R. Co., 503.

See **CONCESSION OF RELIEF; PREFERENCE AND ADVANTAGE; REASONABLE RATES; UNJUST DISCRIMINATION.**

REASONABLE RATES.

1. **SUBJECT CONSIDERED.**

Report of Interstate Commerce Commission, 312.

2. **EVIDENCE.**—Rates will not be declared unreasonable and unlawful under the first section of the Act, without other testimony than that afforded by comparison.

Raymond v. Chicago, Milwaukee and St. Paul R'y, 230.

3. **CONSIDERATIONS WHICH AFFECT QUESTION.**—In determining what is a just and reasonable rate for a particular commodity (for example, wheat) the Commission will take into consideration the earnings and expenses of operating, rates charged upon the same commodity upon other roads as nearly similarly situated as may be, the diversities between the railroad in question and such other roads, the relative amount of through and local business, the proportion borne by the commodity in question to the remainder of the local traffic, the market value of the commodity and its gradual reduction, the reductions made by the carrier upon other articles which are consumed and necessarily required by the producers of the article in question; and all other circumstances affecting the traffic of itself, and as related to other considerations entering into the charges of the carrier.

Evans v. Oregon Railway and Navigation Company, 325.

Reed v. Oregon Railway and Navigation Company, 325.

4. **RAILROAD MATERIAL ENTITLED TO.**—Rates established by a common carrier in order to keep upon its line material for which the road has use, or to keep the price low for its own advantage, cannot be justified.

Reynolds v. Western New York and Pennsylvania Railway Company, 393.

5. **PRINCIPLES RELATING TO.**—When the reasonableness of rates is in question the charges made on long through lines cannot, for reasons stated in the opinion, form a just basis for comparison with local rates for relatively shorter distances.

Crews v. Richmond and Danville Railroad Company, 401.

La Crosse M. & J. Union v. Chicago, Milwaukee and St. Paul R'y Co., 629.

A carrier is not compellable by law to give the merchants of a town on its line the privilege of shipping their goods from the point of purchase to their own locality, and again from thence to the place at which the goods may be sold by them, at the same rate which would have been charged had there been but one shipment from the point of purchase to the point of ultimate delivery.—*Id.*

6. **NOT NECESSARILY PROPORTIONATE TO DISTANCE.**—As a rule in the transportation of freight by railroads while the aggregate charge is continually increasing the further the freight is carried, the rate per ton per mile is constantly growing less.

Farrar & Co. v. East Tenn., Virginia and Georgia R. R., 480.

In the nature of things joint rates on long hauls usually are and as a rule should be lower in proportion to distance than local rates on short hauls on the same commodity.—*Id.*

The Act to regulate commerce throws no restrictions or obstacles in the way of the operation of this rule, but gives it the benefit and aid of its sanction and and safe-guard.—*Id.*

Joint rates on lumber from Dalton to Roanoke and Lynchburg shown to be unreasonable, upon the grounds and for the reasons set forth in the opinion.—*Id.*

Certain local rates held not unreasonable.—*Id.*

See ACT TO REGULATE COMMERCE; PREFERENCE AND ADVANTAGE; RELATIVE
RATES; UNJUST DISCRIMINATION; CLASSIFICATION.

RECEIVER.

COMPLAINT AMENDED. A road being in the hands of a receiver, a complaint was instituted against the company owning it, and in the complaint the receivership was mentioned. But the company was not stated as having come into possession of the road and the receiver was erroneously called the president of the company. The petition was served on him, and the answer was filed by the company. Under the circumstances it was *Held*, proper to allow the petitioner to amend his complaint so as to show the existence of the receivership.

Reynolds v. Western New York & Pennsylvania R'y Company, 347.

REGULAR PATRONS.

NOT ENTITLED TO PREFERENCE.

Riddle, Dean & Company v. New York, Lake Erie and Western Railroad Company, 504.

RE-HEARINGS.

See PRACTICE.

RELATIVE RATES.

1. **UNDER SECTION ONE OF THE ACT.**—Rates must be reasonable relatively as well as absolutely.

Boards of Trade Union of Farmington, &c. v. Chicago, Milwaukee and St. Paul R'y Company, 215.

2. **ADJUSTMENT OF.** Rates and charges not unreasonably high of themselves can be so adjusted in their relations to each other as to give undue preference.

Raymond v. Chicago, Milwaukee and St. Paul R'y, 230.

3. **DUTY CONCERNING.** The spirit and purpose of the Act to regulate commerce requires that when the circumstances and conditions will fairly admit of it the charges to all points for a like service should be made relatively equal.

Crews v. Richmond and Danville Railroad Company, 401.

La Crosse Manufacturers' and Jobbers' Union v. Chicago, Milwaukee and St. Paul Railway Company, 629.

It is not a ground of complaint against a railroad company that it equalizes its rates as between large and small towns, even though the effect may be prejudicial to the large towns, which before had been specially favored—*Ib.*

4. **CIRCUMSTANCES AFFECTING.** The relative reasonableness of rates on shipments from western points to cities on the Atlantic seaboard is to be determined by all the circumstances and conditions that affect the traffic to the respective points between which the rates are questioned, and not solely by one standard of comparison.

Boston Chamber of Commerce v. Lake Shore and Michigan Southern Railway Company, 436.

The length and character of the haul, the cost of the service, the volume of business, the conditions of competition, the storage capacity and the geographical situation at the different terminal points are all elements of importance. *Ib.*

In view of the longer haul to Boston than to New York, the greater cost of transportation to Boston, the very much greater volume of business to and from New York, the competition by water transportation,

and also by several railroad lines, and the geographical and commercial advantages of New York, *Held*, that the existing differentials are not unreasonable.—*Ib.*

See UNJUST DISCRIMINATION.

REPLICATION.

NOT REQUIRED.

In re Procedure in Cases at Issue, 223.

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SETTLERS' TICKETS.

UNJUST DISCRIMINATION.—The sale of land explorers' tickets and settlers' tickets at less than the regular rates charged to passengers at the usual ticket offices, as practiced by the Northern Pacific Railroad Company, is unjust discrimination.

Smith v. Northern Pacific Railroad Company, 208.

SOLDIERS AND SAILORS.

QUESTION OF FREE TRANSPORTATION FOR.

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STOCK CARS, IMPROVED.

- 1. TERMS ON WHICH TAKEN.—Refusal to pay the mileage allowed on exchange of cars between railroad companies is not an unjust discrimination.

Burton Stock Car Co. v. C. B. & Q. R. R. Co. *et al.*, 132.

- 2. RATES CHARGED FOR TRANSPORTATION IN.—Evidence considered and suggestions made, but no finding put upon record for the reason that proofs are not regarded as sufficiently complete.—*Ib.*

SUPERVISION, GENERAL.

OF CARRIERS SUBJECT TO THE ACT.

Report of Interstate Commerce Commission, 293.

TANK CARS.

TRANSPORTATION OF OIL IN.

Rice v. Louisville and Nashville Railroad Co. 503.

TARIFFS.

1. MODIFICATION OF BY CARRIERS.

Report of Interstate Commerce Commission, 286.

2. FILING AND PUBLICATION OF.—*Id.* 292.

3. CIRCULAR CONCERNING FILING JOINT RATES, 657.

4. ORDER FOR PUBLICATION OF JOINT EXPORT TARIFFS.—658.

5. TO BE FRAMED BY CARRIERS.

In re Tariffs of Columbus and Western R'y Co., 696.

THROUGH RATES.

WHEN REQUIRED.—Through rates and through bills of lading given on other commodities and to other points similarly situated should be given on cotton when no excuse is shown for refusing same.

Harwell v. Columbus and Western R. R. Co., 237.

See LONG AND SHORT HAUL CLAUSE.

TICKETS, THROUGH.

AS A FACILITY OF TRAFFIC.

Chicago and Alton Railroad Company v. Pennsylvania Railroad Company, 86.

TRADE CENTERS.

See LONG AND SHORT HAUL CLAUSE; UNJUST DISCRIMINATION; PREFERENCE AND ADVANTAGE.

TRADERS' AND TRAVELLERS' UNION.

1. QUESTION OF FREE TRANSPORTATION FOR.

See TRANSPORTATION.

2. QUESTION OF EXTRA BAGGAGE, ALLOWANCE FOR.

See BAGGAGE.

TRESPASS.

See DAMAGES.

TRIAL BY JURY.

See DAMAGES.

UNDERBILLING.

1. CHARACTER OF TRANSACTION.—The shipper in such cases pays freight upon a less quantity than is actually carried, the result of which is that upon the gross amount he pays a reduced rate; in other words, a less sum than is charged to other shippers for a like service.

In re Underbilling, 623.

2. VIOLATION OF LAW.—The device known as underbilling explained and found to be in contravention to the Act to regulate commerce.—*Ib.*
3. EXTENT OF. Facts stated showing extent to which this device has been employed during winter of 1887 8.—*Ib.*
4. REMEDIES FOR. Various suggestions made in respect to duties of common carrier, inspection of goods tendered for shipment, ascertaining correct weights in all cases, etc.—*Ib.*

UNITED STATES.

TRANSPORTATION FOR.

In re Indian Supplies, 15.

In re United States Commission of Fish and Fisheries, 21.

UNJUST DISCRIMINATION.

1. DISCOUNT FOR QUANTITY.—An offer by a railroad company to give a discount to any consignee who within a year shall receive at any one station a specified amount of freight, which offer purports to be made to secure speedy dispatch, but is not conditioned on speedy dispatch being made, is void, and if a discount is made to one dealer in pursuance of it, all others will be entitled to a like discount.
 Providence Coal Co. v. Providence and Worcester R. R. Co., 107.
 If the real consideration of the offer were to secure speedy dispatch, it should have been open to all who could accept it, regardless of quantity.—*Ib.*
 An offer of a special discount made professedly on one ground in the published tariff, cannot, when that ground fails, be supported by referring it to some other and different ground.—*Ib.*
 A railroad company cannot support a discount based on quantity of freight received by any one shipper, on the principles which are applied among merchants, whereby they give better prices in wholesale than in retail dealings. The cases are not analogous, since the naming of the quantity of freight that shall be compared to wholesale purchases must necessarily be altogether arbitrary, and the duty of impartial service which the company owes to the public will preclude special discriminations being determined by arbitrary tests.—*Ib.*
2. TWO TERMINAL STATIONS AT ONE END OF ROAD. The Providence and Worcester Railroad Company has one terminus on the river in Providence, and another across the river in East Providence; the one in Providence having been first constructed and the other later, and for the convenience of the company. From the Providence terminus to points reached from both the distance is slightly the less. The company is not at liberty to make from Providence to such common points higher charges than from East Providence, in order to force the business to the latter terminus, and would be chargeable with unjust discrimination if it should do so.—*Ib.*
3. ESTOPPEL.—The fact that a railroad company for many years has paid the charge for hauling freight from wharves to its station, does not bind it to continue that practice, and if not bound by contract it may stop doing so at any time.—*Ib.*
4. MILEAGE.—As the Burton Stock Car Co. does not use cars of railroad companies, or exchange cars in any manner, but rents them to the public for hire, the refusal of the defendants to pay the same mileage allowed on exchanges of cars between each other does not constitute unjust discrimination.

Burton Stock Car Co. v. Chicago, Burlington and Quincy R. R. Co. *et al.*, 132.

5. **DATE OF TRANSACTION.**—The Act to regulate commerce does not afford a remedy for unjust discrimination which occurred before the act was passed.

Ottinger v. The Southern Pacific Co., 144.

6. **MILEAGE TICKETS.**—A railroad company that sells mileage tickets must sell them impartially to all the public who apply for them; their sale to a particular class of persons at lower rates than are charged to others is unjust discrimination.

Larrison v. Chicago and Grand Trunk R'y Co., 147.

Associated Wholesale Grocers of St. Louis v. Missouri Pacific R'y Co., 156.

7. **STOCK YARDS.**—It is the duty of common carriers of live stock to provide reasonable and proper facilities for loading and unloading live stock free of charges other than the usual transportation charges.

Keith v. Kentucky Central R. R. *et al.*, 189.

8. **PASSENGER TRANSPORTATION.**—Discrimination in rates charged passengers who enjoy the same accommodations is not justified by proof that the carrier's present or future business will be thereby stimulated, or that the settlement of the country will be promoted, or that those receiving the more favorable rates are persons of small means who are about to locate permanently in the northwest.

Smith v. Northern Pacific Railroad Company, 208.

The rule under which passenger transportation should be conducted requires absolute equality of payment from all persons enjoying the same accommodations.—*Id.*

Colored passengers may be properly assigned separate cars on equal terms; but the accommodations provided must be the same as those provided for white passengers holding the same class of tickets.

Councill v. Western and Atlantic Railroad Company, 339.

Heard v. Georgia R. R. Co., 428.

See PASSENGERS; PREFERENCE AND ADVANTAGE.

9. **RELATIVE RATES.**—Rates must not only be reasonable in themselves, but they should be so relatively reasonable as to protect communities and business against unjust discrimination.

Boards of Trade Union of Farmington, etc. v. Chicago, Milwaukee and St. Paul Railway Company, 215.

When the same carrier operates parallel lines, and for any cause accepts low rates on one of them, it should provide sufficient corresponding advantages to the patrons of the other line to preserve the substantial equality contemplated by the statute.—*Id.*

Low charges upon one of two routes operated by the same carrier should not be made up by relatively high charges upon the other, when the result disastrously affects the business of communities situated upon the the latter line.—*Id.*

10. **RELATIVE RATES.**—If a railway company in establishing charges on different divisions and branches of its road so adjusts them as to divert trade and business to one locality, which naturally, under an equitable adjustment of charges, would go to another, such preference is not excused by the fact that some of such charges are not entirely voluntary but result from competition between carriers.

Raymond v. Chicago, Milwaukee and St. Paul R'y, 231.

11. **WATER COMPETITION.**—When water competition is alleged as a justification for discrimination between localities, the same measure of proof is required to overcome the presumption that it is unjust which is necessary to work an exception under Section 4.

Harwell v. Columbus and Western R. R. Co., 286.

12. **DISTRIBUTION OF CARS.** Where, according to its usual experience, a railroad company has sufficient equipment to meet the demands upon it, or by reason of unusual circumstances freights have accumulated to an exceptional extent, it is not chargeable with violation of law because unable to respond at once to all demands for cars.

Riddle, Dean & Company v. Pittsburgh and Lake Erie Railroad Company, 374.

Nor in such case does it violate any law by refusing to allow its cars to be sent off its line to distant points, when the business offered upon its own line keeps them fully occupied. —*Ib.*

Where by reason of extraordinary circumstances a railroad company cannot promptly meet all calls for cars, it should furnish them ratably and fairly to all shippers in proportion to the freights offered by them respectively. —*Ib.*

13. **DISTRIBUTION OF CARS.**—It is not a valid excuse for refusal to furnish a fair allotment of a certain class of cars that they can be more profitably employed, and can supply the wants of a larger number of shippers, upon another portion of the line.

Riddle, Dean & Company v. New York, Lake Erie and Western Railroad Company, 594.

Regular patrons are not entitled to preference in the use of equipment of common carriers. The public must be justly and equally served. *Ib.*

14. **DISTRIBUTION OF CARS.**—Upon the facts stated, from which it appears that it was the duty of the owners of a mine to have inquired of the agent of the railroad company in respect to cars, which they failed to do. *Held*, that a complaint of unjust discrimination cannot be sustained.

Riddle, Dean & Company v. Baltimore and Ohio Railroad Company, 608.

15. **BETWEEN LOCALITIES.**—The fact that a refusal to give a through rate as for one shipment to shippers who purchase goods to sell again operates prejudicially to the town desiring the privilege, and favorably to another town, does not make the refusal an unjust discrimination when the same rule is applied to all towns, and the privilege accorded to none.

Crews v. Richmond and Danville Railway Company, 401.

La Crosse Manufacturers' and Jobbers' Union v. Chicago, Milwaukee and St. Paul R'y Co., 629.

Unjust discrimination must consist in the doing for or allowing to one party or place what is denied to another; it cannot be predicated of action which in itself is impartial. —*Ib.*

16. **AFFECTING BOSTON RATES.** No unjust discrimination shown to exist in respect to the present differentials charged on business from Western points to Boston, as compared with New York.

Boston Chamber of Commerce v. Lake Shore and Michigan Southern R'y Company, 486.

See **BOSTON EXPORT TRADE.**

17. **RATES ON OIL.**—When oil is transported in tanks permanently affixed

to car bodies the tank is to be considered as part of the car, and for oil transported therein the charge for transportation should be the same by the hundred pounds that the carrier charges for transportation between the same points, of barrels filled with like oil and taken in car-load lots; the carrier is guilty of unjust discrimination if the shipper in barrels is charged a higher rate.

Rice v. Louisville and Nashville R. R. Co., 508.

18. EVIDENCE.—Upon a complaint of unjust discrimination, to rebut the inference arising upon circumstances appearing in the proofs, evidence is admissible to show that during a long course of business the carrier has never exhibited any unfriendly spirit toward the shipper, and that, on the contrary, its agents made extra exertions in good faith to accommodate the shipper in the matter complained of.—*Ib.*

19. SHORT BRANCH ROADS.

Heck & Petree v. East Tenn., Virginia and Georgia R'y, 495.

See ACT TO REGULATE COMMERCE; INTERSTATE COMMERCE; CLASSIFICATION; PREFERENCE AND ADVANTAGE; UNDERBILLING.

WATER COMPETITION.

See LONG AND SHORT HAUL CLAUSE.

1. WHEN NOT SUFFICIENT TO CONSTITUTE EXCEPTION UNDER SECTION 4.
Harwell v. Columbus and Western R. R. Co., 286.
2. IMPORTANCE OF.
Report of Interstate Commerce Commission, 820.
3. EFFECT OF UNDER FOURTH SECTION.
Ib., 280.

WHOLESALE RATES.

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Providence Coal Co. v. Providence and Worcester R. R., 107.
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WITNESSES.

HOW EXAMINED.

Rule IX. and amendment, 4.
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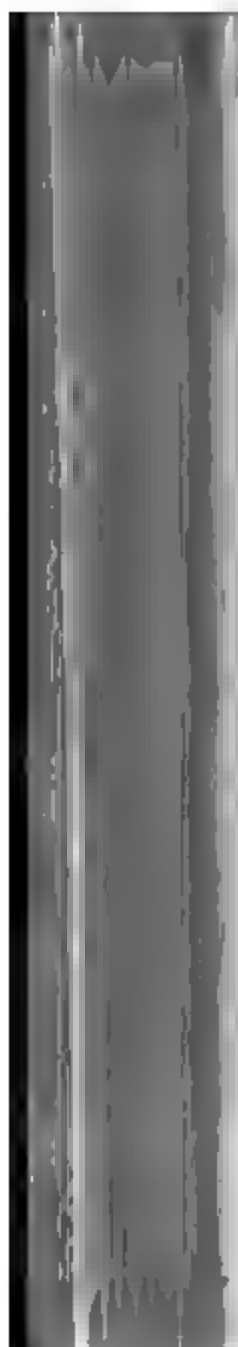
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